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No. _____ Supreme Court, U.S. FILED

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In The

Supreme Court of the United States

STEVEN GENE CHASE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Washington

PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Did the Ninth Circuit Court of Appeals (en banc) fail to apply harmless error review in holding that the erroneous admission of Dr. Dieter's testimony was harmless?

a. Did the Government give "fair assurance," as required by *Kotteakos v. United States*, 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946), that this error was harmless when the Government explicitly told the Ninth Circuit Court of Appeals that this case was "non-prosecutable" without Dr. Dieter's testimony?

b. Did the Ninth Circuit Court of Appeals fail to conduct an evidentiary review, as required by *Kotteakos*, 328 U.S. 750, in determining that admission of Dr. Dieter's testimony was harmless error?

LIST OF PARTIES

Petitioner: Steven Gene Chase

Respondent: United States of America

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CONSTITUTIONAL PROVISIONS, STATUTES, TEXTBOOKS, ETC.:

U.S. CONST. Amend. V 2

I. OPINIONS BELOW

Petitioner was convicted of one count of threatening Federal Law Enforcement Officers in violation of 18 U.S.C. § 115(a)(1)(B) after a jury trial conducted before the United States District Court of Oregon during June of 2000. ER 276-77.

Petitioner appealed his conviction to the Ninth Circuit Court of Appeals urging that the trial court erred in holding that an exception to the psychotherapist-patient privilege existed that allowed the psychotherapist to testify against the petitioner regarding confidential communications and also that the trial court abused its discretion by allowing into evidence FRE 404(b) evidence. A panel court upheld the District Court's verdict. App. 68. *See United States v. Chase*, 301 F.3d 1019 (9th Cir. 2002).

Petitioner moved for rehearing en banc, which was granted. The en banc court agreed with petitioner's assignment of error that the trial court erred by allowing the psychotherapist to testify in violation of the privilege, but nonetheless affirmed the panel court, citing "harmless error." App. 32. *See United States v. Chase*, 340 F.3d 978 (9th Cir. 2003). Petitioner sought reconsideration, which was denied. *See* Order. App. 84. Petitioner now moves for certiorari to the United States Supreme Court.

II. JURISDICTION

By Order dated October 6, 2003, the Ninth Circuit en banc denied petitioner's petition for reconsideration. App. 84. The Supreme Court has jurisdiction to hear this case pursuant to 28 U.S.C. § 1254.

III. CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

A. U.S. CONST. Amend. V which provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

B. 18 U.S.C. § 115(a)(1)(B) which provides:

(a)(1) Whoever –

. . .

> (B) threatens to assault, kidnap, or murder, a United States official, a United States judge, a Federal law enforcement officer, or an official whose killing would be a crime under such section,

with intent to impede, intimidate, or interfere with such official, judge, or law enforcement officer while engaged in the performance of official duties, or with intent to retaliate against such official, judge, or law enforcement officer on account of the performance of official duties, shall be punished as provided in subsection (b).

IV. STATEMENT OF THE CASE

In this case, counsel for the government at oral argument before the en banc court conceded that absent Dr. Dieter's testimony the government could not prosecute its case. As such, the government has conceded that the error was not harmless.

A. Procedural History

On October 29, 1999, Steven Gene Chase was charged by complaint with the crime of threatening to assault or murder a Federal law enforcement officer with the intent to retaliate against such law enforcement officer on account of the performance of official duties in violation of 18 U.S.C. § 115(a)(1)(B). ER 10-16. The defendant was subsequently indicted on the same charge on November 17, 1999. ER 17-18.

A superseding indictment was issued on January 20, 2000. Count 1 charged Mr. Chase with knowingly and intentionally threatening to murder Federal law enforcement officers preparing to execute a search warrant at his home, with intent to impede, intimidate, and interfere with said law enforcement officers while engaged in the performance of their official duties and with intent to retaliate against them on account of the performance of their official duties. Count 2 charged Mr. Chase with threatening to murder Federal law enforcement officers, to wit: FBI agents, investigating potential criminal conduct in connection with a bankruptcy associated with the defendant, with intent to impede, intimidate, and interfere with said law enforcement officers while engaged in the performance of their official duties and with intent to retaliate against them on account of the performance of

their official duties. ER 64-66. Counts 1 and 2 were alleged to be in violation of 18 U.S.C. § 115(a)(1)(B). Count 3 charged Mr. Chase with possession of a firearm by a person adjudicated by the Social Security Administration as a mental defective, in violation of 18 U.S.C. § 21 922(g)(4). ER 64-66.

During pretrial proceedings, the defense moved to suppress all statements and potential testimony from Mr. Chase's therapist, Dr. Kay Dieter. ER 19-30. The court, in an order dated March 22, 2000, denied Mr. Chase's motion. ER 71-81. Although the court recognized the psychotherapist-patient privilege under FRE 501, the court determined that such privilege does not apply with respect to the threats disclosed by Dr. Dieter. ER 78. The trial court also allowed into evidence FRE 404(b) evidence regarding prior threats made by Mr. Chase against other individuals.

Finally, the court on defense motions, dismissed Count 3 on May 31, 2000. 5/31/00 RT 11.

A jury trial was held between June 5, 2000 and June 9, 2000. ER 178, 179-80, 181, 182, 183-190. The jury returned a guilty verdict against Mr. Chase on Count 1, and a not guilty verdict on Count 2. ER 274-75. On May 25, 2001, the court sentenced Mr. Chase to an exceptional sentence of 37 months in prison, three years supervised release, and a $60,000 fine. ER 276-80. On May 25, 2001, the court entered Findings of Fact in support of its sentence. ER 281-88. A notice of appeal was filed on June 1, 2001. ER 289.

On August 21, 2002, the Ninth Circuit Court affirmed Mr. Chase's conviction in a published opinion, *United States v. Chase*, 301 F.3d 1019 (9th Cir. 2002). In affirming his conviction, the panel concluded that the district court

properly recognized a dangerous patient exception to the psychotherapist-patient privilege, and, therefore, Dr. Dieter's testimony was properly admitted. Mr. Chase sought rehearing en banc of the panel's decision affirming the trial court's recognition of a dangerous patient exception to the psychotherapist patient privilege.

On August 22, 2003, the en banc court issued its opinion, finding a testimonial privilege did apply, and that Dr. Dieter's testimony was wrongly admitted. However, the en banc court found this to be harmless error. App. 32. A motion for reconsideration was filed and denied on October 6, 2003. App. 84.

B. Statement of Facts

Dr. Dieter, a psychiatrist employed by Kaiser Permanente in Salem, Oregon, had been treating Steven Chase since 1997 for irritability, anger symptoms, and for depression. Dr. Dieter counseled Mr. Chase every couple of months. RT 469.

On or about August 18, 1999, during a counseling session, Mr. Chase brought in his daytimer, which Dr. Dieter reviewed, RT 472, that contained a list of names, addresses and social security numbers of individuals, that Mr. Chase confided in Dr. Dieter he had thoughts about injuring or killing. These people, who had been involved with his prior business, included the courts, the police, the FBI, and the ex-husband of his wife. RT 473. He also informed Dr. Dieter that he had threatened several people on the list on several occasions personally and individually for the past five years. *Id.*

As a result of this meeting, Dr. Dieter's concern about Mr. Chase heightened, but when Dr. Dieter confronted Mr. Chase about her concerns, he denied that he intended to act out on the threats imminently. RT 476. Dr. Dieter told Mr. Chase that if he had specifics about who he planned to kill, it would be her duty to warn those people about his plans. RT 477. Mr. Chase's anger toward these various people, however, had been expressed to Dr. Dieter the entire time she had treated him. RT 478.

Dr. Dieter's next contact with Mr. Chase occurred over the phone on October 18, 1999. RT 482-83. Mr. Chase told Dr. Dieter he had had an argument with his wife, and he was extremely upset about this event. RT 483. He also mentioned that he had life insurance, which Dr. Dieter believed indicated he was losing his support system with his family and that he was getting his affairs in order by having a life insurance policy. RT 483. After this call, Dr. Dieter met with one of her supervisors to discuss with her this information and whether it should be disclosed. RT 484. As a result of that conversation, legal counsel was contacted and Dr. Dieter contacted the Corvallis Police. RT 484.

After Dr. Dieter contacted the Corvallis Police Department, and subsequently, the FBI, she was ordered by her superiors to cooperate with the FBI. RT 546-47. Mr. Chase's next meeting was set for October 27, and FBI Agent McMullen asked Dr. Dieter to speak with Mr. Chase at this meeting and try to obtain more information from him regarding the threats. RT 547. During Dr. Dieter's meeting with Agent McMullen, he asked her about any references that Mr. Chase made regarding specific FBI agents. RT 553. In Dr. Dieter's initial conversation with the FBI, she revealed that Mr. Chase had mentioned

particular FBI agents. RT 554. But after Dr. Dieter's meeting with Mr. Chase on October 27, 1999, he never specifically mentioned any federal judges, FBI agents or other government officials. RT 569. Rather, he made general references as opposed to specifically naming people. *Id.*

Dr. Dieter did not inform Mr. Chase that she had been contacted by the FBI when she was asking him the questions regarding specific threats that he had made. RT 547-48. During Mr. Chase's meeting with Dr. Dieter on October 27, 1999, however, he stated that he was not going to harm anybody. RT 550. Importantly, throughout Dr. Dieter's treatment of Mr. Chase, he had been venting about the same people, but he had never acted on any of his complaints. RT 551. Even though Mr. Chase became agitated and intense at times, he would calm himself down subsequently and then even apologize for using profanity, which was Mr. Chase's typical response during these counseling sessions. RT 551.

The next day, October 28, 1999, Dr. Dieter was contacted by FBI Agent McMullen who stated that the FBI was going to take action against Mr. Chase, RT 493, including seizing the ledger that Dr. Dieter had referenced. *Id.*

Later that afternoon, Dr. Dieter received several messages that Steven Chase had called, and she was informed that Mr. Chase had learned that the U.S. Marshalls were coming to arrest him. RT 494. After receiving these messages from Mr. Chase, as opposed to returning his call, Dr. Dieter contacted FBI Agent McMullen, RT 495, and warned him that Mr. Chase was aware that law enforcement was coming.

Mr. Chase contacted Agent McMullen upon arriving at the Chase residence, who arranged for Mr. Chase to leave his gun on a table, and to walk outside of his home where the Agent could approach him. RT 683. When the Agent came to meet Mr. Chase, he assisted Agent McMullen over a retaining wall and permitted Agent McMullen to handcuff Mr. Chase without incident. RT 686. Subsequently, Agent McMullen identified himself, and told him about the investigation regarding allegations that Mr. Chase had threatened federal officials and other people, and informed Mr. Chase that he had a search warrant for his home. RT 688.

As the Agent was informing Mr. Chase what he was looking for, Mr. Chase responded that the various documents and items he was seeking were located in various places in his house, including a firearm that was on a table and his dayplanner that was lying just inside the front door. RT 689. Mr. Chase also indicated that when he made statements regarding people dying when the federal marshalls came to his house he was "referring to himself as being who was going to die." RT 690. Mr. Chase also volunteered that all the other statements that he had made to Dr. Dieter about killing people were hypothetical statements. RT 690.

V. REASONS FOR GRANTING PETITION

While the Ninth Circuit decided, en banc, that a testimonial privilege did apply, and that Dr. Dieter's testimony was wrongfully admitted, the court held that this error was harmless. *See* App. 32. The Ninth Circuit denied reconsideration on October 6, 2003.

A. Argument

In *Kotteakos v. United States*, 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946), this Court articulated the essence of the harmless error standard:

> [I]f one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand.

Kotteakos, 328 U.S. at 765.

The Ninth Circuit Court of Appeals violated the *Kotteakos* principles of "fair assurance" and "substantial influence" in the instant case.

1. The Government Did Not Give "Fair Assurance" That the Error Was Harmless.

In harmless error review, the Government bears the burden of persuasion with respect to prejudice. *United States v. Olano*, 507 U.S. 725, 734-35, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993). In other words, the Government has the burden of showing the absence of prejudice – i.e., harmlessness. *Olano*, 507 U.S. at 741; *see O'Neal v. McAninch*, 513 U.S. 432, 115 S.Ct. 992, 130 L.Ed.2d 947 (1995) ("As this Court has stated, 'the original common-law harmless-error rule put the burden on the beneficiary of the error [here, the State] . . . to prove that there was no

injury . . . '") *O'Neal*, at 437; *quoting Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967) (citing 1 J. Wigmore, Evidence § 21 (3d ed. 1940)). This rule applies to both constitutional and non-constitutional errors. *O'Neal*, at 437.

In cases involving non-constitutional error, the Government must show that the error was more probably than not harmless. *United States v. Morales*, 108 F.3d 1031, 1040 (9th Cir. 1997). Specifically, the Government must show a "fair assurance" that the verdict was not substantially swayed by the error. *United States v. Annigoni*, 96 F.3d 1132, 1144 n. 9 (9th Cir. 1996); *see Kotteakos*, at 765.

In the instant case, not only did the government fail to give any assurance that the error was harmless, *see* Brief of Government, it professed to the Ninth Circuit Court of Appeals that there was no case without the erroneously-admitted testimony:

> J: Were those, was that enough evidence to convict [Mr. Chase] without the testimony of the therapist?
>
> JK: I, I would say, no. Essentially it is my evaluation of this case, that the case is non-prosecutable without the testimony of the psychiatrist.

3/25/03 RP 3:9-14, App. 158.[1]

[1] "J" refers to the judge, "JK" refers to Jeffrey Kent, the government's attorney. This excerpted transcript begins approximately 36 minutes into the tape received from the Ninth Circuit Court of Appeals.

Such a statement guarantees that the Government did not meet its burden under harmless error analysis. *See Fiswick v. United States*, 329 U.S. 211, 67 S.Ct. 224, 91 L.Ed. 196 (1946).[2]

In the case before this court, the burden was on the Government to show an absence of prejudice. Instead, the Government professed substantial prejudice – in its pleas to both the trial court and the Ninth Circuit Court of Appeals to allow the testimony of Dr. Dieter.

2. The Ninth Circuit Court of Appeals Failed to Conduct an Evidentiary Review to Determine if the Error Had "Substantial Influence".

When conducting harmless error review, a court must consider the erroneously admitted evidence in addition to that evidence which was properly before the lower court. *Kotteakos*, at 765. Indeed, the *Kotteakos* harmless error analysis demands consideration of the error in the context of the entire record – instead of merely analyzing what remains in the error's absence.

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[2] "The Solicitor General states with commendable candor that in this state of the proof it was manifestly important for the prosecutor 'to bring into the case against petitioners evidence of a character that might better convince the jury that when each failed to reveal his Party connection in registering he had done so upon Party instructions, and, hence, that he was a member of the conspiracy.' The admissions served that purpose. They supplied the first direct evidence that petitioners acted pursuant to the instructions of the consulate. . . . The use made of the admissions at the trial constituted reversible error." *Fiswick*, 329 U.S. at 228-29.

In light of this *Kotteakos* principle, the following observations are illustrative: In its opening statement, the Government introduced its case with the testimony of Dr. Dieter:

> This is an unusual case as you probably already concluded. You are going to hear testimony from a psychiatrist, a Dr. Kay Dieter [who] was treating Mr. Chase for psychiatric or psychological issues. And one of the things that was observed throughout the period was Mr. Chase seemed to suffer from – for lack of a better term again – a rage disorder. That he seemed to rage against anyone who acted or thought in a way that was contrary to his view of the world.

RT 6:8-18.

The government's introduction of Dr. Dieter and her proposed testimony accounted for the first three pages of trial transcript. *See* RT 6-8. The Government spoke at length about how Mr. Chase confided in Dr. Dieter that he, Mr. Chase, had homicidal thoughts against multiple people, including law enforcement agents, and fantasized about acting on these thoughts. RT 7:1-5. The government next spoke of how Dr. Dieter informed the authorities about Mr. Chase's threats:

> So Dr. Dieter took it upon herself to advise, first, the Corvallis Police Department, who in turn put her in touch with the FBI, because FBI agents were also mentioned as being on the hit list.

RT 8:15-19.

Of course, it was Dr. Dieter's contacting law enforcement that initiated the investigation into what ultimately

became the conviction of Count 1. Throughout the government's opening statement Dr. Dieter remained a key figure:

> Dr. Dieter, obviously concerned about the people in this case, made a call to the FBI, reached them just a couple minutes before they would have somewhat casually walked up to the front door with a search warrant, and warned them that Steven Chase was – had left messages where she — he was aware that the FBI was coming, and the, marshals were coming, and people were going to die.

RT 23:22-25; RT 24:1-4.

The Government's direct examination of Dr. Dieter consumed 78 pages of the record. *See* RT 459-526, 559-596, 572. Mr. Chase's defense had to address the doctor's testimony, and did so over the course of 36 pages. *See* RT 526-59, 569-72. Furthermore, the government called Dr. Dieter as a rebuttal witness after the close of Mr. Chase's case. *See* RT 900-09. In total, Dr. Dieter's testimony accounted for 122 pages of the trial transcript.

In its closing, the government again focused on Dr. Dieter:

> Of course, he knows that – at the time of the search Dr. Dieter has told law enforcement about her concerns, that he's got these lists of people. . . . He goes on again about the FBI not protecting him. States they will get theirs too, as well as the judges and the lawyers. She warns him about her – he can't do these things, and tries to reason with him. And says he ranted, nobody ever protected me or my family so why would you warn these mother F's? I can't tell you

> anything now? I can't trust anybody. I will just have to do what I need to do and I will pack up my guns and start here, and get as many as possible, and either the police will take me out or I will get every one of these assholes and their kids. . . .
>
> Now, remember, Dr. Dieter has already disclosed this information to law enforcement. And at her superior's request, she is asked to try to get more specifics about the when and the who and the how and the where.
>
> And when you think about that, that's very important, because what if – what if Dr. Dieter just civilly institutionalized doctor – or Mr. Chase? And the law enforcement arm was never used? We wouldn't have this evidence. There wouldn't have been any search warrant that would have identified who were the people that he was intending to kill.

RT 948:11-25; 949:1-23.

The Government invited the jury to use Dr. Dieter's testimony during its deliberation of *both* counts charged against Mr. Chase, while emphasizing the particular importance of the doctor's testimony:

> Alleged threats should be considered in light of the entire factual context including the surrounding events and the reaction of listeners. . . .
>
> The fact that a psychiatrist, against her oath of confidentiality, would reveal this information because of grave concern regarding potential harm to a list of people that she saw again speaks loudly to the objective reality that these threats, whether or not Mr. Chase intended to follow through with them – we suggest he did, but we

> don't need to prove that – that these threats needed to be taken seriously.

RT 990:9-12, 991:5-12.

Finally, the government asked the jury to use Dr. Dieter's testimony to find that Mr. Chase intended to make good on his threats charged in *both* Count 1 and Count 2:

> I ask you to use that common sense and that collective memory of yours to consider in totality everything that was said and done in those final days. The October 27th meeting with Dr. Dieter where all these dire threats were being made; that his departure for California was imminent; he was going to take care of the FBI agents, too, who hadn't done a damn thing for him. He also indicated in that same period of time that – I don't know if I have those here, *but I believe it's also the testimony of Dr. Dieter that he's going to do this until he's stopped, during the October 27th testimony, which also bears on what his mind set was on October 28th.*
>
> He didn't come right out; he had this gun; these clips; these bullets sitting there where they apparently had been. *And I just ask you to exercise your common sense that any objective, reasonable person would construe the October 27th threats against the FBI agents who didn't help him and the threats against the federal law enforcement officials who were going to search the house as objectively the expression of a serious threat of an intention to do harm.*
>
> Remember with regard to count one, that was a threat in which he was attempting to interfere with the performance of their duty. In count two,

> which involves Gordon McDonald and Dave McLean, that is based upon a threat where he was retaliating against them for not doing enough and investigating the others.

RT 998:6-25; 999:1-19 (emphasis added).

In short, Dr. Dieter's erroneously-admitted testimony was the theme of the Government's case.

The Ninth Circuit Court of Appeals historically follows *Kotteakos*' command to examine the effect of error upon the entire record. *See Ghent v. Woodford*, 279 F.3d 1121 (9th Cir. 2002) ("The State's own actions at trial belie its current arguments regarding the importance of Dr. Shoor's testimony. Its actions demonstrate just how critical the State believed the erroneously admitted evidence to be. The prosecutor in this case fought vigorously for the admission of Dr. Shoor's statements. Furthermore, he relied heavily on Dr. Shoor's testimony during both opening and closing arguments, emphasizing the credibility of the doctor's opinion. The prosecutor qualified Dr. Shoor as an expert in psychiatry and stressed Dr. Shoor's experience, truthfulness, and Stanford University training[.]") *Ghent*, 279 F.3d at 1131 (citations omitted)); *see also United States v. Vizcarra-Martinez*, 66 F.3d 1006 (9th Cir. 1995) ("Our review of the record reveals that the government relied heavily upon the evidence in question during its opening argument, closing argument, and rebuttal. The government's heavy reliance upon this evidence created a grave danger that the defendant's guilt was established not 'by evidence relevant to the particular offense being tried,' but rather by a 'showing that the defendant has engaged in other acts of wrongdoing.' Given that this case was not 'open and shut,' we cannot say that it is more probable than not that the government's forceful and

repetitive references to the defendant's use of methamphetamine did not affect the jury's decision.") *Vizcarra-Martinez*, 66 F.3d at 1017 (citations omitted); *United States v. Bauer*, 132 F.3d 504 (9th Cir. 1997);[3] *see also United States v. Mett*, 178 F.3d 1058 (9th Cir. 1999).

In *Satterwhite v. Texas*, 486 U.S. 249, 108 S.Ct. 1792, 100 L.Ed.2d 284 (1988), this Court, recognizing *Kotteakos*, answered the question whether it was harmless error to introduce psychiatric testimony obtained in violation of

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[3] After considering the magnitude of the error and the Government's other evidence against Bauer, we conclude that the violation of Bauer's attorney-client privilege was not harmless. . . .

We find it insightful that, both before and during the criminal trial, the Government did not view Rivera's testimony as insignificant to its case against Bauer. The Government spent a lot of effort to present that testimony at trial and emphasized its importance to the jury in closing argument. Fifteen pages of the Government's thirty-page trial brief were devoted exclusively to legal arguments supporting the admissibility of Rivera's testimony. Rivera was the Government's final witness in its case-in-chief, creating the image that this was the Government's star witness who should leave the jury with a lasting impression of the importance of the attorney's testimony. Finally, the Government emphasized Rivera's testimony in its closing argument to the jury:

For the Government now to argue on appeal that its other evidence of Bauer's intent was "overwhelming," after having fought so hard to present Rivera's testimony to the jury and emphasizing it in closing argument, is unconvincing. Because we are not left with a fair assurance that the verdict was not substantially swayed by the error of admitting Rivera's testimony, Bauer's conviction must be reversed.

Bauer, 132 F.3d at 510, 512.

the psychoanalyst testimonial privilege during a capital sentencing proceeding.[4] *See Satterwhite*, 468 U.S. 249. This Court observed:

> Dr. Grigson was the State's final witness. His testimony stands out both because of his qualifications as a medical doctor specializing in psychiatry and because of the powerful content of his message. Dr. Grigson was the only licensed physician to take the stand. He informed the jury of his educational background and experience, which included teaching psychiatry at a Dallas medical school and practicing psychiatry for over 12 years. He stated unequivocally that, in his expert opinion, Satterwhite "will present a continuing threat to society by continuing acts of violence."
>
> . . .
>
> The District Attorney highlighted Dr. Grigson's credentials and conclusions in his closing argument:
>
> "Doctor James Grigson, Dallas psychiatrist and medical doctor. And he tells you that on a range from 1 to 10 he's ten plus. Severe sociopath. Extremely dangerous. A continuing threat to our society. Can it be cured? Well, it's not a disease. It's not an illness. That's his personality. That's John T. Satterwhite." 8 Record 2725-2726.
>
> The finding of future dangerousness was critical to the death sentence. Dr. Grigson was the only

[4] The petitioner was denied counsel during the proceeding, and thus the court used the *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967) "reasonable doubt" standard of harmless error review (addressing constitutional error). *See Satterwhite*, at 258-59. Still, the *Satterwhite* reasoning applies.

> psychiatrist to testify on this issue, and the prosecution placed significant weight on his powerful and unequivocal testimony.

Id., at 259-60.

Based largely on the above, the *Satterwhite* court held that the error in admitting the doctor's testimony was not harmless. *See Id.* Thus, both this Court and the Ninth Circuit examine the presence of error in assessing its consequences to the rights of the accused.

In the instant case, however, the Ninth Circuit en banc court violated *Kotteakos* by its wholesale failure to review the record and consider the effect of the erroneously admitted evidence upon the remaining evidence. *See United States v. Chase*, 340 F.3d 978 (9th Cir. 2003). Indeed, the *Chase* court's harmless error "analysis" consisted of the following verbatim text:

> We have held that Dr. Dieter's testimony was admitted in violation of the federal psychotherapist-patient privilege. Our remaining task is to determine whether that error was harmless. . . .
>
> "[H]armless error analysis applies to the improper admission of evidence, and reversal is proper only if the government cannot show that the error was more probably than not harmless." *United States v. Beckman*, 298 F.3d 788, 793 (9th Cir. 2002). Because a violation of the psychotherapist-patient privilege is not a constitutional error, the government must show that the prejudice resulting from the error was "more probably than not harmless." *See United States v. Bauer*, 132 F.3d 504, 510 (9th Cir.1997). To meet that standard, the government must "show a fair assurance that the verdict was not substantially

> swayed by the error." *Id.* (internal quotation marks omitted).
>
> *We are satisfied that the admission of Dr. Dieter's testimony was harmless error. The jury acquitted Defendant on Count II, which related to the threats that Defendant communicated to Dr. Dieter during therapeutic sessions, a result that suggests, at a minimum, that she did not influence the jury unduly. Dr. Dieter's testimony had no bearing on Count I, on which the jury convicted Defendant. Count I arose entirely from Defendant's expression of threats to a Kaiser Permanente telephone operator. On this record, we believe that the result on Count I surely would have been the same even without Dr. Dieter's testimony. That being so, the erroneous admission of her testimony did not prejudice Defendant.*

Chase, 340 F.3d at 992-93 (emphasis added).

While paying lip service to *Kotteakos* and its progeny, the Ninth Circuit Court in the instant case did not consider the effect Dr. Dieter's testimony had on the jury's deliberation of Count 1, of which Mr. Chase was convicted. The en banc court simply presumed, since the jury had convicted Mr. Chase of Count 1, and acquitted him of Count 2, that the jury had somehow compartmentalized the testimony of Dr. Dieter. Such a presumption is forbidden by *Kotteakos*:

> The Government's theory seems to be, in ultimate logical reach, that the error presented by the variance is insubstantial and harmless, if the evidence offered specifically and properly to convict each defendant would be sufficient to sustain his conviction, if submitted in a separate trial. [T]his is not and cannot be the test[.]

> But in apparent support of its view the Government argues that there was no prejudice here because the results show that the jury exercised discrimination as among the defendants whose cases were submitted to it. As it points out, the jury acquitted some, disagreed as to others, and found still others guilty. From this it concludes that the jury was not confused and, apparently, reached the same result as would have been reached or would be likely, if the convicted defendants had been or now should be tried separately.

Id., at 767.

In the instant case, the Government relied exclusively on Dr. Dieter's testimony to convince the jury that threats by Mr. Chase to members of law enforcement were matters to be taken seriously. The Ninth Circuit Court of Appeals failed to address the effect Dr. Dieter's testimony, in its entirety, had on the jury's deliberation as to Count 1. This legal error begs this Court to remand this case back to the Ninth Circuit for a "careful review of the entire record." *See United States v. Young*, 470 U.S. 1, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985) (Justice Brennan, with whom Justice Marshall and Justice Blackmun join, concurring in part and dissenting in part)[5].

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[5] When we detect legal error in a lower court's application of the plain-error or harmless-error rules, as here, the proper course is to set forth the appropriate standards and then remand for further proceedings. We have followed this procedure in countless cases. But the Court today reaches out without explanation and inappropriately decides the issue itself. Its analysis is flawed in several respects, and these flaws demonstrate the wisdom of leaving such inquiries in the first instance to the lower courts. . . . [T]he plain-error

(Continued on following page)

VI. CONCLUSION

Based on the arguments, records and files contained herein, this petition for writ of certiorari should be granted, and this matter set for further briefing and argument as this Court deems necessary.

RESPECTFULLY SUBMITTED this 30th day of January, 2004.

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inquiry necessarily requires a careful review of the entire record to determine the question of possible prejudice. The Court in two brief paragraphs summarizes its review of the record and proclaims that the evidence of Young's guilt was "overwhelming" and supported the conviction "beyond any doubt whatever." *Ante*, at 1049. The Court invokes a curious analysis in support of this pronouncement: the fact that the jury acquitted Young on "the most serious charge he faced . . . reinforces our conclusion that the prosecutor's remarks did not undermine the jury's ability to view the evidence independently and fairly." *Ante*, at 1048, n. 15. If the evidence against Young was so "overwhelming," it is difficult to perceive why the jury would have returned a partial acquittal. The jury's decision can just as naturally be interpreted to suggest that the evidence was close and the verdict a compromise[.]

Young, 470 U.S. at 30-31 (Brennan) (footnote omitted).

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee*, v. STEVEN GENE CHASE, *Defendant-Appellant.*	No. 01-30200 D.C. No CR-99-60113-MRH OPINION

Appeal from the United States District Court
for the District of Oregon
Michael R. Hogan, Chief District Judge, Presiding

Argued and Submitted En Banc
March 25, 2003 – San Francisco, California

Filed August 22, 2003

Before: Mary M. Schroeder, Chief Judge, and Harry Pregerson, Thomas G. Nelson, Andrew J. Kleinfeld, Sidney R. Thomas, Susan P. Graber, M. Margaret McKeown, William A. Fletcher, Raymond C. Fisher, Ronald M. Gould, and Richard R. Clifton, Circuit Judges.

Opinion by Judge Graber;
Concurrence by Judge Kleinfeld

COUNSEL

Brett A. Purtzer, Law Offices of Monte E. Hester, Inc.; Tacoma, Washington, for the defendant-appellant.

Jeffrey J. Kent, Assistant United States Attorney, Eugene, Oregon, for the plaintiff-appellee.

OPINION

GRABER, Circuit Judge:

A jury convicted Defendant Steven Gene Chase of violating 18 U.S.C. § 115(a)(1)(B) after he made a threat against agents of the Federal Bureau of Investigation. The jury acquitted him of a charge involving threats to other FBI agents. The threat underlying Defendant's conviction was expressed to a telephone operator at a Kaiser Permanente clinic. The threats as to which Defendant was acquitted were communicated, during therapeutic sessions, to his psychiatrist, who testified about them.

On appeal, Defendant argues that the psychotherapist-patient privilege precluded the psychiatrist's testimony about what he told her during therapeutic sessions. We agree and hold that the privilege applied; we decline to craft a "dangerous patient" exception to the testimonial privilege. Thus, the district court erred in admitting the psychiatrist's testimony regarding threats that Defendant had related during treatment. Nonetheless, we affirm Defendant's conviction, because the error was harmless.

BACKGROUND

Defendant began receiving treatment at Kaiser Permanente from psychiatrist Kay Dieter in 1997. He was suffering from irritability, depression, and symptoms of anger. Defendant experienced, among other things, episodes of rage and obsessive rumination against certain people, including those who participated in various legal proceedings in which Defendant was involved. Eventually Defendant was diagnosed with bipolar type II disorder. He received disability benefits due to his psychiatric condition. Defendant met with Dr. Dieter every couple of

months for therapy and for management of his medication. Defendant met more often (ranging from bi-weekly to monthly) with psychologist Robert Schiff for psychotherapy.

During a counseling session on August 18, 1999, Defendant showed Dr. Dieter his day planner, which contained a list of names, addresses, and social security numbers. The list included two FBI agents who had investigated complaints lodged by Defendant. Defendant confided to Dr. Dieter that he had thought about injuring or killing these people and that he had threatened some of the listed individuals several times during the preceding five years.

Dr. Dieter became concerned that Defendant might act on his threats. Defendant told Dr. Dieter that he had no intention to act immediately on his homicidal thoughts. Nonetheless, Dr. Dieter warned Defendant that if he told her specifics about whom he planned to kill, she would have a duty to disclose the threats to the intended victims so that they could protect themselves.

Following this session, Dr. Dieter discussed with one of her supervisors her concerns regarding Defendant's threats. She asked whether she had a duty to warn potential victims. The supervisor suggested that Dr. Dieter try to elicit more information from Defendant before taking any further action.

On October 18, 1999, Defendant called Dr. Dieter to tell her that he had argued with his wife and was extremely upset. Defendant told Dr. Dieter that he had a life insurance policy that would pay off if anything should happen to him. Fearing that Defendant was losing his support system, Dr. Dieter met with a supervisor and with Kaiser Permanente's legal counsel to discuss again

whether Defendant's threats should be disclosed. Legal counsel advised Dr. Dieter to contact the local police department in Corvallis, Oregon, Defendant's home town. Dr. Dieter contacted the Corvallis police on October 19. On October 25, agents of the FBI got in touch with her. She disclosed to the FBI agents the threatening statements that Defendant had made during therapeutic sessions and identified the people whom Defendant had threatened. Dr. Dieter's supervisors instructed her to continue to cooperate with the authorities and to attempt to elicit more information about Defendant's plans during their next appointment.

Defendant and Dr. Dieter met again on October 27. Dr. Dieter did not tell Defendant about her disclosures to the authorities or her instructions from her supervisors. Defendant related the details of another fight with his wife and told Dr. Dieter that his mother had just been diagnosed with cancer. Defendant reiterated his frustration with the legal system (including the FBI, which Defendant complained was not protecting him adequately) and said that, if a lien against his house was not dropped by the time he met with his lawyer on November 2, "he would get his guns, get in his vehicle and have himself some justice." Defendant told Dr. Dieter that he had gathered more information on the people he intended to kill and that he had located all but four of those on his list. Dr. Dieter repeated her admonition regarding her duty to warn Defendant's intended victims. Defendant alternated between claiming that he did not have any plans to act immediately and reiterating his threats.

On October 28, FBI Agent Donald McMullen spoke with Dr. Dieter and told her that the FBI was planning to interview Defendant and to execute a search warrant on

his home, looking for weapons and the day planner containing the list of threatened individuals. Later that day, Defendant left several voice-mail messages for Dr. Dieter, telling her that he believed he was about to be arrested. (Apparently a neighbor of Defendant's, who was curious about why United States Marshals were questioning her about Defendant and speaking of arresting him, had called Defendant.) Defendant also spoke with two of the clinic's telephone operators, telling one that "there are FBI Marshals that are on their way out to get me and if that happens, people are going to die." Dr. Dieter did not return Defendant's calls. Instead, she notified Agent McMullen to alert him to the fact that Defendant knew that the authorities were on their way.

Agent McMullen and his team went to Defendant's home but, before proceeding, called for backup. Defendant's wife arrived while the agents were waiting. The agents prevented her from entering the house. A series of cell-phone negotiations ensued, involving Defendant, his wife, and his lawyer. Finally, a deal was struck whereby Defendant would put his gun on a table and leave the house. As agreed, Defendant walked into his yard, assisted McMullen over a wall, and allowed himself to be handcuffed. Defendant told McMullen about the gun on the table and about the location of the day planner; Defendant did not mention two other firearms that were hidden in the house. Defendant said that when he told the clinic operator that people were going to die if the agents came to his home, he meant that *he* would die. Defendant also referred to the threatening statements conveyed to Dr. Dieter as "hypothetical."

Defendant was arrested and charged on three counts: Count I (threatening to murder federal law enforcement

officers who were preparing to execute a search warrant on his home); Count II (threatening to murder the FBI agents who, he complained, had failed to investigate his earlier complaints properly); and Count III (possession of firearms by a person adjudicated by the Social Security Administration to be mentally defective). The district court dismissed Count III before trial.

At trial, Defendant challenged the admissibility of (1) Dr. Dieter's testimony relating to statements that Defendant had made during therapeutic sessions and (2) evidence of threats that he had made against individuals other than federal law enforcement officers. The district court held that Dr. Dieter's testimony was admissible. The court reasoned that the federal psychotherapist-patient privilege did not apply because Dr. Dieter properly had determined that Defendant's threats were serious when uttered, that harm was imminent, and that disclosure to authorities was the only means of averting the threatened harm. The district court also held that evidence of other threats was admissible under Federal Rule of Evidence 404(b). The court determined that this evidence was relevant under Count II to Defendant's intent to retaliate against FBI agents for their perceived failure to investigate appropriately the people against whom Defendant had filed complaints.

Dr. Dieter testified at trial. She recounted the therapeutic sessions in which Defendant had threatened FBI agents and others (the basis of Count II). Two Kaiser Permanente telephone operators testified to the conversations they had with Defendant while federal agents were en route to his home (the basis of Count I).

Following the trial, the jury convicted Defendant on Count I (threatening the agents who were en route to execute the search warrant) but acquitted him on Count II (the threats communicated during sessions with Dr. Dieter). Defendant timely appealed his conviction, arguing that admission of Dr. Dieter's testimony violated the psychotherapist-patient privilege and that other-acts evidence was improperly admitted under Rule 404(b). A three-judge panel of this court affirmed the district court's evidentiary rulings and affirmed the conviction. *United States v. Chase,* 301 F.3d 1019 (9th Cir. 2002) (per curiam). We then agreed to rehear this case en banc. 314 F.3d 1031 (9th Cir. 2002).

STANDARD OF REVIEW

We review de novo the ruling of a district court on the scope of a privilege. *Oleszko v. State Comp. Ins. Fund,* 243 F.3d 1154, 1156 (9th Cir.), *cert. denied,* 534 U.S. 892 (2001).

DISCUSSION

To answer the ultimate question whether Dr. Dieter's testimony was properly admitted and, if not, whether Defendant is entitled to a reversal of his conviction, we will answer a series of four subsidiary questions:

- Was Defendant's communication to Dr. Dieter of threats to third parties a confidential communication that, ordinarily, is subject to a federal testimonial privilege? We answer that question "yes."

- Did Dr. Dieter properly disclose the threats to law enforcement personnel? Again, our answer is "yes."
- Did Dr. Dieter's disclosure destroy the federal testimonial privilege? Our answer is "no." We hold that there is no dangerous-patient exception to the federal psychotherapist-patient testimonial privilege.
- Does the district court's error in allowing Dr. Dieter to testify about what occurred during therapeutic sessions require us to reverse Defendant's conviction? We answer "no" to this final question. Because the jury acquitted Defendant of the threats to which Dr. Dieter testified and because, on this record, the outcome on the count of conviction would have been the same without her testimony, we hold that the error was harmless.

A. *Defendant's communication to Dr. Dieter was confidential under state law and privileged under both state and federal law.*

At the outset, we differentiate two distinct concepts: confidentiality and testimonial privilege. By "confidentiality," we refer to the broad blanket of privacy that state laws place over the psychotherapist-patient relationship. By "privilege," we mean the specific right of a patient to prevent the psychotherapist from testifying in court.

All 50 states and the District of Columbia have enacted laws protecting psychotherapist-patient confidentiality. *See* 3 Jack B. Weinstein & Margaret E. Berger, Weinstein's Federal Evidence § 504.03[4][b], at p. 504-11 & n.12 (2d ed. 1997, Release No. 67-02/00) (listing statutes).

These laws commonly perform two functions: They establish a testimonial privilege, and they also create a more general blanket of confidentiality to cover the relationship in all contexts. A psychiatrist who is subject to such a law may not testify in court as to therapeutic conversations with her patient; neither may she gossip about them with her grocer.

Oregon, where Defendant received treatment from Dr. Dieter, is no exception. Confidentiality is protected by statute. *See, e.g.,* Or. Rev. Stat. § 677.190(5) (listing as a ground for revocation or suspension of a medical license the divulging of a patient's confidences); 2003 Or. Laws ch. 86, § 1 (H.B. 2305) (stating legislative policy to protect patients' medical records from disclosure); Or. Rev. Stat. §§ 109.675-.695 (allowing minors 14 years of age or older to obtain diagnosis and treatment of, inter alia, a mental or emotional disorder, without parental knowledge or consent in most circumstances); Or. Rev. Stat. § 430.399(5) (providing that records of a drug- or alcohol-treatment facility shall not be revealed without the patient's consent); *see also Humphers v. First Interstate Bank,* 696 P.2d 527 (Or. 1985) (explaining sources of confidentiality requirement). A concomitant state-court testimonial privilege is provided in Oregon Evidence Code § 504(2):

> A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purposes of diagnosis or treatment of the patient's mental or emotional condition among the patient, the patient's psychotherapist or persons who are participating in the diagnosis or treatment under the direction of the psychotherapist, including members of the patient's family.

Defendant's statements were made in the course and scope of treatment. Accordingly, Defendant's communications to Dr. Dieter were confidential under state law (although an exception permitted disclosure of certain parts of the communications, as we explain below). That is so even though the threats that Defendant communicated arguably constituted a crime. Once Defendant finished uttering the threats, the charged crime was completed, and the psychiatrist was in the same position she would have occupied had her patient described a bank robbery in which he had participated a week earlier.[1]

Defendant's disclosures to his psychiatrist also were subject to a testimonial privilege in federal court, unless some exception applies. Federal Rule of Evidence Rule 501 states in part:

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.

"Reason and experience" are the "touchstones" for acceptance of a privilege under Rule 501. *Jaffee v. Redmond,* 51 F.3d 1346, 1355 (7th Cir. 1995), *aff'd,* 518 U.S. 1 (1996).

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[1] This case does not involve threats to the psychotherapist herself, so we need not decide whether such communications would be similarly confidential or privileged.

The Supreme Court, resolving a circuit split, first recognized a psychotherapist-patient privilege in *Jaffee*. There, the Court held that "confidential communications between a licensed psychotherapist and her patients in the course of diagnosis or treatment are protected from compelled disclosure under Rule 501 of the Federal Rules of Evidence." *Id.* at 15. In arriving at its conclusion, the Supreme Court acknowledged that testimonial privileges generally are disfavored, but observed that a testimonial privilege may be justified by a "public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth." *Id.* at 9 (internal quotation marks omitted).

The *Jaffee* Court paid particular attention to the experience of the states. The determination "[t]hat it is appropriate for the federal courts to recognize a psychotherapist privilege under Rule 501 is confirmed by the fact that all 50 States and the District of Columbia have enacted into law some form of psychotherapist privilege." *Id.* at 12. The Court reaffirmed the principle that "the policy decisions of the States bear on the question whether federal courts should recognize a new privilege," *id.* at 12-13, and observed that, "[b]ecause state legislatures are fully aware of the need to protect the integrity of the factfinding functions of their courts, the existence of a consensus among the States indicates that 'reason and experience' support recognition of the privilege," *id.* at 13. Additionally,

> given the importance of the patient's understanding that her communications with her therapist will not be publicly disclosed, any State's promise of confidentiality would have little value if the patient were aware that the privilege would not

> be honored in a federal court. Denial of the federal privilege therefore would frustrate the purposes of the state legislation that was enacted to foster these confidential communications.

Id. (footnote omitted).

Moreover, the privilege is justified independently by important private and public interests. As to the private interest served by the privilege, the Court recognized that

> a psychiatrist's ability to help her patients "is completely dependent upon [the patients'] willingness and ability to talk freely. This makes it difficult if not impossible for [a psychiatrist] to function without being able to assure . . . patients of confidentiality and, indeed, privileged communication. Where there may be exceptions to this general rule . . . , there is wide agreement that confidentiality is a *sine qua non* for successful psychiatric treatment." Advisory Committee's Notes to Proposed Rules, 56 F.R.D. 183, 242 (1972).

Id. at 10-11 (other citation and internal quotation marks omitted).

As to the public interest served, the Court recognized that "[t]he psychotherapist privilege serves the public interest by facilitating the provision of appropriate treatment for individuals suffering the effects of a mental or emotional problem. The mental health of our citizenry, no less than its physical health, is a public good of transcendent importance." *Id.* at 11.

Despite its seemingly sweeping endorsement, the Court in *Jaffee* declined to delineate the "full contours" of

the psychotherapist privilege. *Id.* at 18. In a footnote that presaged the issues presented to us today, the Court noted:

> Although it would be premature to speculate about most future developments in the federal psychotherapist privilege, we do not doubt that there are situations in which the privilege must give way, for example, if a serious threat of harm to the patient or to others can be averted only by means of a disclosure by the therapist.

Id. at 18 n.19.

We read that footnote as endorsing – albeit elliptically – a duty to disclose threats to the intended victim and to the authorities, the issue to which we turn next.[2]

B. *Dr. Dieter properly disclosed the threats to the authorities.*

Most states have a dangerous-patient exception to their psychotherapist-patient confidentiality laws. *United States v. Hayes,* 227 F.3d 578, 583 (6th Cir. 2000). Some of these exceptions allow, and some require, a psychotherapist to disclose threats made by a patient during therapeutic sessions if the psychotherapist determines that the

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[2] As we will explain, most states have strong rules of psychotherapist-patient privilege that prevent a psychotherapist from testifying about the content of therapeutic sessions. Nevertheless, many states permit psychotherapists contemporaneously to disclose (for example, to the police) threats made by a "dangerous patient" in order to protect intended victims. We believe that the *Jaffee* footnote was intended to extend this nontestimonial disclosure rule to psychotherapist-patient relationships to which federal law applies (such as treatment by federally employed psychologists at overseas army hospitals).

patient poses a risk of serious harm to self or others. This exception is often referred to as the *Tarasoff* duty, *see, e.g.*, George C. Harris, *The Dangerous Patient Exception to the Psychotherapist-Patient Privilege: The Tarasoff* Duty and the *Jaffee* Footnote, 74 Wash. L. Rev. 33 (1999), after the California case that first introduced it. *See Tarasoff v. Regents of Univ. of Cal.*, 551 P.2d 334, 340 (Cal. 1976) ("When a therapist determines, or pursuant to the standards of his profession should determine, that his patient presents a serious danger of violence to another, he incurs an obligation to use reasonable care to protect the intended victim against such danger. The discharge of this duty may require the therapist to take one or more of various steps, depending upon the nature of the case. Thus it may call for him to warn the intended victim or others likely to apprise the victim of the danger, to notify the police, or to take whatever other steps are reasonably necessary under the circumstances.").

Oregon recognizes this exception to the rule of confidentiality. Under Oregon law, a provider of mental health care may disclose "[i]nformation obtained in the course of diagnosis, evaluation or treatment of an individual that in the professional judgment of the health care services provider, indicates a clear and immediate danger to others or to society." Or. Rev. Stat. § 179.505(12), *amended by* 2003 Or. Laws ch. 88 (H.B. 2307).

In the circumstances of this case, we have no doubt that Dr. Dieter properly disclosed the threats that Defendant had related regarding several specific individuals. Even if we were wrong in that conclusion, however, a state-law breach of psychotherapist-patient *confidentiality* would not necessarily lead to an abrogation of the federal *testimonial privilege*.

The Federal Rules of Evidence apply only to proceedings in federal court. *See* Fed. R. Evid. 101 ("These rules govern proceedings in the courts of the United States and before the United States bankruptcy judges and United States magistrate judges, to the extent and with the exceptions stated in rule 1101."). Dr. Dieter's disclosure to law enforcement personnel occurred long before any federal court proceedings had commenced. If her disclosure were improper, then Defendant might have a civil remedy in state court, *see Humphers,* 696 P.2d at 533 ("A number of decisions have held that unauthorized and unprivileged disclosure of confidential information obtained in a confidential relationship can give rise to tort damages."), or Dr. Dieter might be answerable to the Oregon Board of Medical Examiners, which disciplines psychiatrists for violations of ethical rules, *see* Or. Rev. Stat. § 677.205 (2001). But Rule 501 is not implicated by an improper disclosure made outside of federal court proceedings.

The more difficult question under Rule 501 is what effect a *proper* disclosure may have: In other words, whether we should recognize a dangerous-patient exception to the federal *testimonial privilege* arising out of, or coextensive with, the dangerous-patient exceptions to states' rules of *confidentiality.* We turn next to that question.

C. *We decline to recognize a dangerous-patient exception to the federal testimonial privilege.*

We are faced with an even split between the two circuits that have considered the question under Rule 501. That is, whether we decide that there is a dangerous-patient exception to the federal psychotherapist-patient privilege, or that there is not, we will have company.

The Tenth Circuit has said that a psychotherapist may testify about a threat made by a patient if "the threat was serious when it was uttered and . . . its disclosure was the only means of averting harm . . . when the disclosure was made." *United States v. Glass,* 133 F.3d 1356, 1360 (10th Cir. 1998). This is the approach that the district court and the three-judge panel took. *Chase,* 301 F.3d at 1024.

By contrast, the Sixth Circuit has held that there is no dangerous-patient exception to the psychotherapist-patient privilege. *Hayes,* 227 F.3d at 585-86. We agree with the Sixth Circuit for the four reasons that follow.

1. *The States' Experiences*

The *Tarasoff* duty, by definition, lifts the blanket of *confidentiality* covering psychotherapist-patient communications under state law. Ordinarily, however, the *Tarasoff* duty does not abrogate the *testimonial privilege* in state courts. *Id.* at 585. Generally, the psychotherapist may (or must) warn the authorities or the intended victims of a dangerous patient, but still may not testify to confidential communications in state-court proceedings.[3] Of the states in the Ninth Circuit, only California has an *evidentiary* dangerous-patient exception. *See id.* (explaining that

[3] Many states carve out separate testimonial exceptions, which permit psychotherapists to testify at commitment hearings and other identified proceedings. *See, e.g.*, Cal. Evid. Code § 1004 ("There is no privilege under this article in a proceeding to commit the patient or otherwise place him or his property, or both, under the control of another because of his alleged mental or physical condition.").

California is alone in the nation in enacting a dangerous-patient exception in its law of evidence). In California, a psychotherapist not only must disclose to authorities or intended victims the existence of a dangerous patient, but also may testify to threats made in the course of therapy. *See* Cal. Evid. Code § 1024 ("There is no privilege under this article if the psychotherapist has reasonable cause to believe that the patient is in such mental or emotional condition as to be dangerous to himself or to the person or property of another and that disclosure of the communication is necessary to prevent the threatened danger.").

Almost all the states, then, recognize the distinction between confidentiality (which is affected by the *Tarasoff* duty) and testimonial privilege (which is not). In Oregon, where Defendant resided, received psychiatric treatment, and was convicted, the distinction has been explained this way by the state's supreme court:

> It is important to distinguish between the evidentiary privilege which is claimed by a patient, or a psychotherapist in behalf of a patient (OEC 504(3)), to prevent disclosure of confidential information *at trial,* and the discretionary authority of a public health care provider or any ethical obligation that a licensed psychotherapist may have to notify the police or other proper authority in order to aid a victim or warn of future dangerousness. The public interest to be served by notifying the police, in most cases, could be achieved by divulging only that information needed to show why a clear and immediate danger is believed to exist. It would rarely justify the full disclosure of the patient's confidences to the police, and never justify a full disclosure in open court, long after any possible danger has passed.

State v. Miller, 709 P.2d 225, 236 (Or. 1985) (footnote omitted). Had Defendant been prosecuted in state court, Dr. Dieter could not have testified about what Defendant told her during therapeutic sessions, notwithstanding her permissible disclosure of threats to the authorities. *See also State v. Wilkins,* 868 P.2d 1231, 1235 (Idaho 1994) (defining Idaho's testimonial privilege and reversing a conviction where a psychotherapist testified at sentencing to threats made by the defendant during therapy).

The states' experiences are relevant in two ways. First, the states' experiences are instructive in themselves, *see Jaffee,* 518 U.S. at 12, especially when they are nearly uniform over a significant period of time. Second, a dangerous-patient exception affirmatively would weaken state confidentiality laws. The Supreme Court reasoned in *Jaffee* that refusing to recognize a federal psychotherapist-patient privilege would undermine the states' confidentiality laws. *Id.* at 13. Exceptions to the federal privilege, where state laws contain no parallel exception, would have a similar effect. A state's promise of confidentiality has less value if the patient knows that an exception to the privilege applies in federal court.

2. *Differing Purposes of State Confidentiality Laws and the Federal Testimonial Privilege*

As we have just explained, the states themselves disconnect confidentiality from the testimonial privilege. Similarly, the Sixth Circuit has opined that it would be a mistake to view

> the standard of care exercised by a treating psychotherapist prior to complying with (or, for that matter, failing to comply with) a state's "duty to

> protect" requirement is somehow pertinent to the applicability of the psychotherapist/patient privilege in criminal proceedings. We think there is little correlation between those two inquiries.

Hayes, 227 F.3d at 583. The Sixth Circuit continued, saying that it saw

> only a marginal connection, if any at all, between a psychotherapist's action in notifying a third party (for his own safety) of a patient's threat to kill or injure him and a court's refusal to permit the therapist to testify about such threat (in the interest of protecting the psychotherapist/patient relationship) in a later prosecution of the patient for making it. State law requirements that psychotherapists take action to prevent serious and credible threats from being carried out serve a far more immediate function than the proposed "dangerous patient" exception. Unlike the situation presented in *Tarasoff,* the threat articulated by a defendant [who makes a threat in the course of therapy] is rather unlikely to be carried out once court proceedings have begun against him.

Id. at 583-84. We agree with the Sixth Circuit for two reasons, one theoretical and the other practical.

As to the first of those considerations, analytically there is little connection between a psychotherapist's state-imposed obligation to report a dangerous patient at the time the patient makes a threat, on the one hand, and the later operation of the federal testimonial privilege, on the other. The *Tarasoff* duty is justified on the ground of protection; the societal benefit from disclosing the existence of a dangerous patient outweighs the private and public cost of the deleterious effect on the psychotherapist-patient relationship. By contrast, ordinarily testimony at a

later criminal trial focuses on establishing a past act. There is not necessarily a connection between the goals of protection and proof. If a patient was dangerous at the time of the *Tarasoff* disclosure, but by the time of trial the patient is stable and harmless, the protection rationale that animates the exception to the states' confidentiality laws no longer applies.

Second, as a practical matter, the fact that different states have different standards regarding when a psychotherapist must (or may) breach confidentiality by disclosing a patient's threats counsels against hinging the *Jaffee* testimonial privilege on the protective disclosure laws of the states. For example, Washington's exception to the confidentiality requirement allows for disclosure by a psychotherapist "[t]o appropriate law enforcement agencies and to a person, when the identity of the person is known to the public or private agency, whose health and safety has been threatened, *or who is known to have been repeatedly harassed,* by the patient." Wash. Rev. Code § 71.05.390(10) (emphasis added). By contrast, in California, when a psychotherapist "determines, or pursuant to the standards of his profession should determine, that his patient presents a serious danger of violence to another, he incurs an obligation to use reasonable care to protect the intended victim against such danger." *Tarasoff,* 551 P.2d at 340.

Those standards are materially different. In Washington, a therapist has permission to disclose conversations if the patient has repeatedly harassed someone, even if the psychotherapist does not think that the patient presents a "serious danger of violence." In California, a patient who engages in similar harassment retains the confidentiality because the patient does not present a "serious danger of

violence." If the federal evidentiary privilege were tied to the states' disclosure laws, then similarly situated patients would face different rules of evidence in federal criminal trials. The Washington patient's therapist could testify under a dangerous-patient exception (because his therapist permissibly had disclosed a communication under state law), while the California patient's psychotherapist would be forbidden from testifying. The Federal Rules of Evidence should apply uniformly and not vary depending on the state in which the defendant resides. *See United States v. DeWater,* 846 F.2d 528, 530 (9th Cir. 1988) ("Using federal rules of evidence and procedure and case law promotes the uniform disposition of criminal matters in the federal system."); *see also Lippay v. Christos,* 996 F.2d 1490, 1497 (3d Cir. 1993) (discussing "Congress' intent that the Federal Rules of Evidence have uniform nationwide application"); *Boren v. Sable,* 887 F.2d 1032, 1038 (10th Cir. 1989) (stating that "the Federal Rules of Evidence are intended to have uniform nationwide application").

The strongest argument in favor of tying a dangerous-patient exception to state laws is that, "when the [psychotherapist] has specifically informed the patient that the [psychotherapist] will not keep the communications confidential, there is no barrier to that person testifying." *Hayes,* 227 F.3d at 587 (Boggs, J., dissenting). The logic of this argument is that, if the patient knows that the psychotherapist can disclose threats to third parties that the patient communicates during treatment, then the patient has no expectation of confidentiality in the first place when communicating the threats; therefore, there is no reason to treat such communications as "privileged."

This view is a cousin to a common analysis of the waiver of a privilege. As the New York Court of Appeals observed almost one hundred years ago, "when a secret is out, it is out for all time, and cannot be [caught again] like a bird, and put back in its cage." *People v. Bloom,* 85 N.E. 824, 826 (N.Y. 1908); *see also* 2 McCormick on Evidence § 93, at 371-72 (5th ed. 1999) ("Finding waiver in situations in which forfeiture of the privilege was not subjectively intended by the holder is consistent with the view, expressed by some cases and authorities, that the essential function of the privilege is to protect a confidence which, once revealed by any means, leaves the privilege with no legitimate function to perform.").

We are unpersuaded by this argument for two reasons. First, it relies to some extent on a fiction that the patient knows that a disclosure for one purpose (warning a potential target of violence) is a disclosure for all purposes (including incriminating testimony in a federal criminal trial).[4] Such a conclusion is not a logical necessity; a communication can be "not confidential" under state law, but still "privileged" under the Federal Rules of Evidence.[5]

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[4] Because the result is not affected, we assume for purposes of this opinion that all of Dr. Dieter's testimony was privileged. Thus we leave for another day the questions whether a psychotherapist may testify to (a) the existence of a therapeutic relationship; (b) the fact of disclosure of threats as permitted under state law; and (c) the content of that disclosure. We also need not decide whether a person to whom a psychotherapist discloses threats may testify to the existence or content of the disclosure.

[5] In this case, Dr. Dieter did not inform Defendant that she might testify against him in court, although she did warn him that she would disclose his threats for the purpose of protecting intended victims. We need not decide whether the result would be different if a psychotherapist

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Second, to the extent that a patient actually does know the law and the rules of evidence, the legal rule itself, whatever it may be, will govern the patient's expectations. If, for example, the operative legal rule is that a therapist may disclose threats in order to warn intended victims, but may *not* testify to the threats in federal court – the analogue to the rule in most states – that is the rule that the patient will assume is in effect.

3. *The 1972 Proposed Rule*

In 1972 the Chief Justice of the United States, on the recommendation of the Judicial Conference Advisory Committee on the Rules of Evidence, submitted nine proposed testimonial privileges to Congress. *See* Jaffee, 518 U.S. at 8 n.7; *see also* Huston Combs, Note, *Dangerous Patients: An Exception to the Federal Psychotherapist-Patient Privilege,* 91 Ky. L.J. 457, 459-60 (2003). One of these privileges, embodied in Proposed Rule 504, was a psychotherapist-patient privilege. Proposed Federal Rules of Evidence, 56 F.R.D. 183, 240-41 (1972). The Proposed Rule establishing that privilege also created three exceptions: proceedings to hospitalize a patient for mental illness, proceedings to examine the mental or emotional condition of the patient, and proceedings in which the patient's mental or emotional condition is relevant to a claim or defense. *Id.* at 241.

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informed a patient ahead of time that she would testify in court; arguably, the patient in that circumstance would be agreeing that the subsequent communication was not confidential.

Conspicuously absent from the list was a dangerous-patient exception. One commentator has explained that the "omission was deliberate. The exceptions allowed were patterned after those in [a] then-existing Connecticut statute." *Harris*, 74 Wash. L. Rev. at 37. The Proposed Rules cited an article by two authors of the Connecticut statute. *See* 56 F.R.D. at 243-44 (*citing* Abraham S. Goldstein & Jay Katz, *Psychiatrist-Patient Privilege: The GAP Proposal and the Connecticut Statute,* 36 Conn. B.J. 175, 182 (1962)). Professors Goldstein and Katz wrote:

> It should be noted that our committee deliberately chose not to write a "future crime" exception into the bill. Its members were persuaded that, as a class, patients willing to express to psychiatrists their intention to commit crime are not ordinarily likely to carry out that intention. Instead, they are making a plea for help. The very making of these pleas affords the psychiatrist his unique opportunity to work with patients in an attempt to resolve their problems. Such resolutions would be impeded if patients were unable to speak freely for fear of possible disclosure at a later date in a legal proceeding.

Goldstein & Katz, 36 Conn. B.J. at 188.

As explained by one commentator,

> [t]his logic was apparently persuasive to the federal Advisory Committee. As explained by [Weinstein]: "[a]lthough some . . . have argued that the need for disclosure is paramount when possible harm is threatened, [Proposed Rule] 504 proceeds on the assumption that less harm will ensue if patients feel free to ventilate their intentions."

Harris, 74 Wash. L. Rev. at 38 (quoting 2 Jack B. Weinstein & Margaret A. Berger, Weinstein's Federal Evidence § 504[05], at 504-27 (2d ed. 1996, Release No. 35-8/89); *see also* Harris, 74 Wash L. Rev. at 67-68 ("The Supreme Court in *Jaffee,* following the lead of the Federal Rules Advisory Committee and state legislatures, made a policy judgment that the value of protecting the confidentiality of the psychotherapist-patient relationship outweighs the evidentiary value of admitting a patient's confidential statements for the purpose of proving criminal conduct by the patient. The powerful and salutary impulse to protect potential victims that gave rise to the *Tarasoff* duty to warn should not be allowed to distort the consistent application of that policy judgment. Indeed, the rationale supporting that judgment includes the belief that protection of the therapeutic relationship will result in less patient violence.").

Of course, Congress ultimately chose to enact the more open-ended Rule 501 rather than the proposed rule. Nevertheless, because "the Supreme Court has officially recognized the psychotherapist-patient privilege, and cited favorably to [Proposed Rule 504] as initially proposed, the contents of the [Proposed Rule] have considerable force and should be consulted when the psychotherapist-patient privilege is invoked." 3 Weinstein's Federal Evidence § 504.02, at 504-7 (footnote omitted).

4. *Public Policy*

Finally, in exercising our common-law function as we consider whether to recognize a dangerous-patient exception under Rule 501, we turn to the policies underlying psychotherapist-patient confidentiality and the states'

disclosure exceptions. The confidentiality laws, and the testimonial privilege, are designed to assist the individual patient who has sought help and, on a larger scale, to improve public health. *Jaffee* 518 U.S. at 11-12. Any exception necessarily has some adverse effect on the candor that the psychotherapist-patient privilege is meant to encourage, because patients will be more reluctant to divulge unsavory thoughts or urges if they know that the therapist may be required to testify about the content of therapeutic sessions.

The justification for the dangerous-patient exception to states' confidentiality rules is, of course, the health and safety of the potential victim of the patient. The potential victim's well-being is as important as that of the patient. The difficult question is how to balance the patient's need for candor, in service of therapy, against the potential victim's need for protection.

As noted, the states have balanced those needs at the time of the threat by requiring, or at least permitting, disclosure to the potential victim and to the authorities. The issue is somewhat more subtle when we reach the time of a trial at which the threats, originally disclosed during a therapeutic session, are relevant to a federal criminal proceeding. What *marginal* harm is done to the psychotherapist-patient relationship by the additional disclosure, and what *marginal* protection is offered to society?

We know that the initial disclosure to the target or to the authorities can be damaging to the psychotherapist-patient relationship. But we think that a patient will retain significantly greater residual trust when the therapist can disclose only for protective, rather than punitive,

purposes. In other words, the marginal additional harm to the relationship is significant. As the Sixth Circuit expressed it:

> [R]ecognition of a "dangerous patient" exception surely would have a deleterious effect on the "atmosphere of confidence and trust" in the psychotherapist/patient relationship. While early advice to the patient that, in the event of the disclosure of a serious threat of harm to an identifiable victim, the therapist will have a duty to protect the intended victim, may have a marginal effect on a patient's candor in therapy sessions, an additional warning that the patient's statements may be used against him in a subsequent criminal prosecution would certainly chill and very likely terminate open dialogue. *See, e.g.,* Gregory B. Leong, *et al., The Psychotherapist as Witness for the Prosecution: The Criminalization of Tarasoff,* AM. J. PSYCHIATRY 149:8, at 1011, 1014 (Aug.1992). Thus, if our Nation's mental health is indeed as valuable as the Supreme Court has indicated, and we think it is, the chilling effect that would result from the recognition of a "dangerous patient" exception and its logical consequences is the first reason to reject it.

Hayes, 227 F.3d at 584-85.

On the other side of the equation, the obvious good afforded by a dangerous-patient exception is that, if psychotherapists were permitted to testify in federal criminal cases to matters discussed with patients during treatment, it is more likely that patients who have threatened others will be convicted. If convicted, the patient may be incarcerated, and incarceration is one way to ensure protection of the intended victim and others. However, the

additional protection that would come from the psychotherapists' testimony is not as great as it may seem at first blush.

We note, first, that there are many situations in which the privilege simply would not apply at all. For example, if a patient engaged in a criminal act, such as an assault, at the doctor's office, no privilege would apply because the privilege protects only communications. *See Jaffee,* 518 U.S. at 15 ("[W]e hold that confidential communications between a licensed psychotherapist and her patients in the course of diagnosis or treatment are protected from compelled disclosure under Rule 501 of the Federal Rules of Evidence.").

Second, it usually will be the case that there is other evidence of the crimes in question. The privilege does not apply to non-psychotherapists to whom similar threats may have been uttered. *See Jaffee,* 518 U.S. at 9-10 ("[T]he question we address today is whether a privilege protecting confidential communications *between a psychotherapist and her patient* promotes sufficiently important interests to outweigh the need for probative evidence. . . . Both 'reason and experience' persuade us that it does." (emphasis added) (citation and internal quotation marks omitted)).

Third, the federal testimonial privilege would not apply in state court proceedings, including commitment proceedings.[6] States generally allow psychotherapists to

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[6] Proposed Federal Rule of Evidence 504(d)(1) provided: "There is no privilege under this rule for communications relevant to an issue in proceedings to hospitalize the patient for mental illness, if the psychotherapist in the course of diagnosis or treatment has determined that

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testify in civil commitment proceedings, which are designed in part to detain and deter mentally ill persons who are dangerous. Oregon has such a provision. *See* Or. Evid. Code § 504(4)(d) (providing that there is no privilege for confidential communications, or records thereof, when the statutes pertaining to commitment allow the use of such evidence).

Finally, although incarceration is one way to eliminate a threat of imminent harm, in many cases treatment is a longer-lasting and more effective solution. A criminal conviction with the help of a psychotherapist's testimony is almost sure to spell the end of any patient's willingness to undergo further treatment for mental health problems. *See Hayes,* 227 F.3d at 585 ("Once in prison, even partly as a consequence of the testimony of a therapist to whom the patient came for help, the probability of the patient's mental health improving diminishes significantly. . . . ").

On balance,[7] we conclude that the gain from refusing to recognize a dangerous-patient exception to the

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the patient is in need of hospitalization." Proposed Federal Rules of Evidence, 56 F.R.D. 183, 241 (1972).

[7] We recently examined, en banc, the scope of a habeas petitioner's waiver of the attorney-client privilege arising from a claim of ineffective assistance of counsel. We held that the waiver extends *only* to the litigation of the federal habeas petition. *Bittaker v. Woodford,* 331 F.3d 715 (9th Cir. 2003) (en banc). In holding that a waiver for purposes of the habeas claim did not amount to waiver for all purposes, we "start[ed] by noting that . . . we must strike a delicate balance between the interests of the state and those of the federal government." *Id.* at *5. *Bittaker* supports the notion that a waiver of a privilege in one context does not necessarily mean extinguishment of the privilege for all time and in all circumstances.

psychotherapist-patient testimonial privilege in federal criminal trials outweighs the gain from recognizing the exception.

5. *Conclusion*

A dangerous-patient exception to the federal psychotherapist-patient testimonial privilege would significantly injure the interests justifying the existence of the privilege; would have little practical advantage; would encroach significantly on the policy prerogatives of the states; and would go against the experience of all but one of the states in our circuit, as well as the persuasive Proposed Rules. We therefore decline to recognize a dangerous-patient exception to the federal psychotherapist-patient privilege.

Dr. Dieter testified about some of her conversations with Defendant during therapeutic sessions. Because Defendant's statements were made for the purpose of obtaining treatment, and because there is no dangerous-patient exception to the federal privilege that otherwise applies, *see Jaffee,* 518 U.S. at 15, the admission of Dr. Dieter's testimony about Defendant's communications to her was erroneous.[8]

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[8] The government invites us, in the alternative, to hold that Defendant's threats were not privileged because they fall under a crime/fraud exception to the psychotherapist-patient privilege. *See In re Grand Jury Proceedings (Gregory P. Violette),* 183 F.3d 71, 77 (1st Cir. 1999) (holding that a crime/fraud exception applies to the psychotherapist/patient privilege and that statements are not privileged if they were made "to promote a particular crime or fraud" or were "intended directly to advance a particular criminal or fraudulent endeavor"

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D. *The error in admitting Dr. Dieter's testimony was harmless.*

Defendant was convicted only on Count I, the making of a threat against the FBI agents who were en route to his home. This threat was communicated to a telephone operator at Kaiser Permanente. Defendant does not argue that his communications to the operators were confidential or that the operators are subject to an evidentiary privilege.[9] Count I, which involved only the threat that Defendant conveyed to a Kaiser Permanente operator, rested on the operator's testimony.

The threats to which Dr. Dieter testified formed the basis of Count II, on which Defendant was acquitted. We have held that Dr. Dieter's testimony was admitted in violation of the federal psychotherapist-patient privilege. Our remaining task is to determine whether that error was harmless.

Because the answer will affect our harmless-error analysis, we pause to consider whether the evidence of

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instead of to serve the goals of legitimate therapy). We have not determined whether such an exception exists. We need not decide the question here, because Defendant's statements to his therapist would not qualify under such a standard, even if we adopted one. Defendant did not make his threats with the intention of promoting or directly advancing the commission of a future crime. (Indeed, the jury found that the threats were not a past crime, either.) Defendant's purpose was to obtain treatment for his mental illness; that is, Defendant's revelations were made in pursuit of the goals of legitimate therapy. *See Chase,* 301 F.3d at 1025 n.3 (explaining that Defendant's "statements to Dr. Dieter were . . . well within the scope of legitimate therapy").

[9] Accordingly, we leave for another day the question whether such communications fall within the psychotherapist-patient privilege.

other threats was properly admitted in the government's case concerning Count II. We believe that it was, for the reasons stated in the three-judge panel's opinion. *Chase,* 301 F.3d at 1026-31.

"[H]armless error analysis applies to the improper admission of evidence, and reversal is proper only if the government cannot show that the error was more probably than not harmless." *United States v. Beckman,* 298 F.3d 788, 793 (9th Cir. 2002). Because a violation of the psychotherapist-patient privilege is not a constitutional error, the government must show that the prejudice resulting from the error was "more probably than not harmless." *See United States v. Bauer,* 132 F.3d 504, 510 (9th Cir. 1997). To meet that standard, the government must "show a fair assurance that the verdict was not substantially swayed by the error." *Id.* (internal quotation marks omitted).

We are satisfied that the admission of Dr. Dieter's testimony was harmless error. The jury acquitted Defendant on Count II, which related to the threats that Defendant communicated to Dr. Dieter during therapeutic sessions, a result that suggests, at a minimum, that she did not influence the jury unduly. Dr. Dieter's testimony had no bearing on Count I, on which the jury convicted Defendant. Count I arose entirely from Defendant's expression of threats to a Kaiser Permanente telephone operator. On this record, we believe that the result on Count I surely would have been the same even without Dr. Dieter's testimony. That being so, the erroneous admission of her testimony did not prejudice Defendant.

AFFIRMED.

KLEINFELD, Circuit Judge, with whom Circuit Judges T.G. NELSON and CLIFTON join, concurring in the result:

I concur in the result, that the conviction should be affirmed. If there were error, it would be, as the majority concludes, harmless. I dissent from the majority's view that the psychotherapist-patient privilege applies even to a patient's imminent, seriously intended, and properly disclosed threat to commit murder.

It is important to make clear what this case is not. The majority decision does not preserve confidentiality in therapeutic relationships. This is not a case about a patient who says to his psychotherapist "I have homicidal thoughts and feelings, and although I am not going to act on them, they disturb me and I need your help to get rid of them." This case involves a patient who says "I am going to kill FBI agents," has engaged in preparation and has the means to do so, and is understood by the psychotherapist to be voicing a serious intention to act imminently. The patient was understood by his psychotherapist to be past the point of seeking help that would prevent criminal action, so she felt it essential to warn his prospective victims and did so. His therapeutic confidentiality was gone.

No doubt many patients' disclosures to psychotherapists would sound alarming were they repeated in court, and yet would not be "true threats." But here, appellant does not put at issue whether he made a "true threat,"[1]

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[1] *See Watts v. United States*, 394 U.S. 705 (1969).

both in what he said to his psychotherapist, and what he said to the clinic operator. One might perhaps argue that statements made to a psychotherapist or her staff in the course of obtaining therapy cannot constitute a threat to federal officials under the statute of conviction,[2] but that argument has not been made in this case, so we do not speak to it. Once it is assumed, as in this case, that a true threat to kill FBI agents made to a third party constitutes the crime, it follows that the psychotherapist observed the patient committing a crime in her office, just as she would have if she had seen the patient steal her receptionist's purse on the way out. As a percipient witness to a felony, she ought to be required to testify to what she perceived.

The case is controlled by federal common law. Psychotherapists' ethical obligations regarding patients' rights to privacy are not the same thing as federal evidentiary privilege. Psychotherapists' duties of confidentiality, and tort duties to potential victims of patients are also distinct from federal evidentiary privilege. These are matters of professional ethics and state law. Both have some relevance, because they educate us on what is generally expected of psychotherapists in therapeutic relationships with dangerous patients, but neither is controlling. As the Sixth Circuit has held, the connection between a state law duty to inform a prospective victim of a threat has only a "marginal connection, if any at all" to the federal evidentiary question of the scope of the psychotherapist patient testimonial privilege.[3] The controlling Federal Rule of

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[2] 18 U.S.C. § 115(a)(1)(B).

[3] *United States v. Hayes,* 227 F.3d 578, 583 (6th Cir. 2000).

Evidence, Rule 501, provides that except as the Constitution, *federal* statutes, or *federal* rules may otherwise provide, and except for certain civil cases, "the privilege of a witness . . . shall be governed by the principles of the *common law* as they may be interpreted by *courts of the United States* in the light of *reason and experience*."[4] Thus the extensive state authorities relied upon by the majority as a basis for decision, are, as a matter of law, *prohibited* to us as a controlling basis for decision. Of course we look to state authorities, both statutes and judicial decisions, for guidance insofar as they shine the "light of reason and experience" on the question,[5] but we must be "governed," Rule 501 says, by federal judicial decisions on the common law of privilege.

There is already a circuit split on whether there is a dangerous patient exception to the federal psychotherapist-patient privilege, as the majority recognizes.[6] The Tenth Circuit in *United States v. Glass*[7] held that a psychotherapist may testify about a patient's threat if it was serious when made and disclosure was the only means of

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[4] Fed.R.Evid. 501 (emphasis added).

[5] Fed.R.Evid. 501. *See also Jaffee v. Redmond,* 518 U.S. 1, 12-13 (1996) (policy decisions of states "bear" on recognition of federal privileges).

[6] *See In re Grand Jury Proceedings (Gregory P. Violette),* 183 F.3d 71, 74 (1st Cir. 1999) (finding crime-fraud exception to privilege) and *United States v. Glass,* 133 F.3d 1356, 1360 (10th Cir. 1998) (therapist may testify if threat was serious and disclosure was the only means of averting harm); *but see United States v. Hayes,* 227 F.3d 578, 579 (6th Cir. 2000) (no dangerous patient exception to psychotherapist-patient privilege).

[7] 133 F.3d 1356, 1360 (10th Cir. 1998).

averting harm. The Sixth Circuit in *United States v. Hayes*[8] held that there is no dangerous patient exception. The First Circuit in *In re Grand Jury Proceedings (Gregory P. Violette)*[9] held that the crime or fraud exception to the attorney-client privilege applies to the psychotherapist-patient privilege.

The Supreme Court has spoken expressly to the issue in this case, saying that the privilege does not apply in cases such as the one before us. The only reason we have any room to opine to the contrary, as the majority does, is that the Court spoke in dicta. The holding in *Jaffee v. Redmond*[10] is that there is indeed a psychotherapist privilege under Rule 501. The dictum critical to this case is a footnote, in which the Court says **"we have no doubt that there are situations in which the privilege must give way, for example, if a serious threat of harm to the patient or to others can be averted only by means of a disclosure by the therapist."**[11]

The case before us is precisely the one described in the *Jaffee* footnote. The Supreme Court has said in the plainest English that in cases such as the one before us, "the privilege must give way." We ordinarily treat Supreme Court dicta with "due deference"[12] even though they are not binding. Because we are to interpret those decisions "in the light of reason and experience," the Supreme

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[8] *United States v. Hayes,* 227 F.3d 578 (6th Cir. 2000).

[9] 183 F.3d 71 (1st Cir. 1999).

[10] 518 U.S. 1 (1996).

[11] *Jaffee,* 518 U.S. at 18, n.19 (emphasis added).

[12] *United States v. Baird,* 85 F.3d 450, 453 (9th Cir. 1996).

Court's dictum should speak even more persuasively than usual, since, dictum or not, what the Court says reflects its "reason and experience."

The words "the privilege must give way" do not mean that "the right to out-of-court confidentiality must give way," or that "the right to confidentiality is superseded by the duty of out-of-court disclosure to the prospective victim." They mean what they say, that what must "give way" is the "privilege." The "privilege" is the privilege not to testify in federal court. There is only one way to read the plain English of the *Jaffee* footnote, and that is that the privilege of a psychotherapist to refuse to testify in federal court, or her patient's privilege to bar her testimony, does not exist "if a serious threat of harm to the patient or to others can be averted only by means of a disclosure by the therapist."[13] That is, once the serious threat occurred that could be averted only by disclosure, the privilege died.

The majority attempts to resuscitate the privilege not to testify. The privilege breathed its last when the "serious threat of harm" could be and was "averted only by means of a disclosure by the therapist."[14] Artificial respiration of a privilege dead under Supreme Court language that speaks directly to it takes a miracle.[15] I do not think the majority brings it off. It says "[w]e read that footnote as endorsing – albeit elliptically – a duty to disclose threats to the intended victim and the authorities. . . ."[16] The majority's

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[13] *Jaffee,* 518 U.S. at 18 n.19.

[14] *Id.*

[15] *Cf.* 2 Kings 4:31-37.

[16] Majority Op. at 11930.

adverb, "elliptically" means "[m]arked by obscurity of style or expression."[17] "The privilege must give way" is not obscure. Any lawyer knows what the word "privilege" means. The context of the *Jaffee* footnote was the patient's privilege to bar her psychotherapist's testimony in federal court under Federal Rule of Evidence 501. The majority makes the surprising supposition that "the *Jaffee* footnote was intended to extend [state requirements of disclosure of threats] to psychotherapist-patient relationships to which federal law applies (such as treatment by federally employed psychologists at overseas army hospitals)."[18] There is nothing in *Jaffee* to support that remarkable speculation.

The majority reads the words "the privilege must give way" to mean that *the privilege* does *not* give way, and what does give way is the psychotherapist's duty to keep the patient's communication secret from the prospective victim (for an Army doctor in Frankfurt). But that is not what the Court said. And it makes no sense to say, as the majority apparently does, that the Court was speaking to the issue of whether a psychotherapist may disclose a serious threat to the prospective victim, rather than whether the psychotherapist may testify in court about it. *Jaffee* raised only the issue of testimonial privilege, not the issue of disclosure. The issue of testimonial privilege, to which the Court expressly spoke, is a federal common law issue under Federal Rule of Evidence 501. The issue of duty to disclose to the prospective victim is a state tort law issue,

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[17] *The American Heritage Dictionary* 446 (2d ed. 1982).

[18] Majority Op. at 11930, n. 2.

not a matter of federal law, and not within the scope of *Jaffee*. There is just no getting around the proposition that *Jaffee* said, and meant, that the psychotherapist-patient "privilege must give way," referring to the privilege under Rule 501 to refuse to testify.[19]

But I concede that the Court's remark does not bind us, because it is dictum (though it has the look of a footnote added to avert a risk that someone in the majority perceived were the opinion published without it). So let us turn to "reason and experience," as Rule 501 commands. As the majority concedes, the states are divided with California recognizing a dangerous patient exception to the privilege and others not. The majority rejects any such exception on policy grounds, arguing that once the psychotherapist warns the prospective victim, there is little social value in obtaining the psychotherapist's testimony and much value in excluding it to preserve a therapeutic relationship.

This argument is not compelling. In the case at bar, the psychotherapist told the patient, when he first voiced threats, that she would have a duty to disclose threats he made. Subsequently, she did disclose them to the FBI as she told him she would. This patient plainly did not need an assurance of confidentiality to speak honestly to his psychotherapist about what he felt and what he planned to do about his feelings. Nor did he have one. The psychotherapist had told him his threatening communications would be disclosed. In my view (as in the view of the dissenting judge in the Sixth Circuit case in similar

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[19] *Jaffee*, 518 U.S. at 18 n.19.

circumstances)[20] this case could be simply and properly resolved on the ground that by communicating after the psychotherapist had told him she would not keep the communications secret, appellant waived the privilege. Communicating to a psychotherapist on express terms that the communication will be disclosed is an unprivileged medical communication, much like communication by a plaintiff to a defense physician under Federal Rule of Civil Procedure 35.

The majority opinion notes the distinction between disclosure to the prospective victim and testimony in court, but draws the wrong inference from it. The majority concludes that the privilege remains in force even though disclosure is made,[21] but that does not make much sense. Once disclosure is made, the patient has lost the medical benefit of being able to speak to his psychotherapist in confidence that what he says will remain secret. His communications are disclosed, and he knows it. His hated enemy, whom he plans to kill, is now privy to his communication to his psychotherapist. Once the person the deranged individual hates so much that he plans to kill him knows his secrets, and the deranged individual knows that his psychotherapist refuses to keep his secrets from that person, there is not much therapeutic value in refusing later to tell this already-disclosed information to the judge and jury. After all, the deranged person does not hate them and his confidentiality is long gone. The majority is evidently concerned about deranged murderous

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[20] *United States v. Hayes*, 227 F.3d 578, 588 (6th Cir. 2000) (Boggs, J., dissenting).

[21] Majority Op. at 11920.

individuals stopping valuable therapy because the psychotherapist reveals their confidences. But where that will occur, it will doubtless already have occurred where the psychotherapist betrayed their confidences to their worst enemies.

Psychiatry and psychotherapy are often of great value, and rely for their value on open and candid communication by the patient. I have no doubt that testimony by psychotherapists against their patients, or for that matter disclosure to prospective victims by psychotherapists, harms the therapeutic relationship. But the therapeutic relationship is not the only social value at stake. The prospective victims' lives are at stake.

Sometimes a warning may suffice to protect the victim, sometimes not. FBI agents, the prospective victims in this case, carry guns and know how to use them, so perhaps they (but not their spouses and children) could protect themselves if they know who to look out for. But most people cannot. What, exactly, is one to do if a psychotherapist calls up and says "I have a deranged patient who plans to kill you, and he's serious?" Call the police? They do not provide bodyguard services. Seek state civil commitment proceedings, as the majority opinion suggests? How shall the threatened individual assemble the money for lawyers and experts and persuade the involved bureaucracies and individuals to act fast enough to prevent realization of the threat? The fastest way to get someone locked up who threatens to kill a federal official in violation of the statute of conviction may well be a federal criminal proceeding in which the psychotherapist testifies about what the patient says.

Protecting federal officials from assassination is only part of the purpose of the law. The statute criminalizing threats against federal officials[22] is not merely prophylactic, to prevent the harms threatened. It prohibits the threats themselves. Federal officials, high and low, are supposed to be able to do their jobs, not only without being killed, but also without facing death threats. The threats themselves inhibit the efficient functioning of government. Suggesting, as the majority opinion does, that threatened officials try to get the threateners civilly committed does nothing to alleviate the interference with government functioning caused by the threats.

Beyond these practical concerns, there is another concern, altogether ignored by the majority opinion. That is the concern with having the truth vindicated and justice done. The tradition of the common law, as Wigmore teaches, is that privileges are "distinctly exceptional, being so many derogations from a positive general rule" that "the public . . . has a right to every man's evidence."[23] The reason that the states found it necessary to provide by statute for a physician-patient privilege is that Lord Mansfield, in the Duchess of Kingston's Trial (a House of Lords trial for bigamy) had rejected it as a matter of common law.[24] In the 1600's "the obligations of honor among gentleman" was often sufficient ground for refusing to testify, but in the same "notorious Duchess of Kingston's Case" in 1776, "the older point of view was definitely abandoned and the new one thoroughly

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[22] 18 U.S.C. § 115.

[23] 8 John Henry Wigmore, *Evidence in Trials at Common Law* § 2192, at 70 (John T. McNaughton rev., 1961).

[24] *Id.* § 2380 at 818.

promulgated."[25] The common law preference is for the truth coming out, rather than privilege.

The question for the jury in this case was whether Steven Gene Chase did or did not make true threats to kill FBI agents. As in any trial, little can be more important than that the verdict be true. That is why we call it a "verdict," derived from Latin roots for "true speech." Although in this case the verdict would plainly be true even were the trier of fact deprived of the psychiatrist's testimony, in many cases that will not be so. Where the patient does not pose so serious a threat of harm that the psychiatrist realizes disclosure is needed to avert the threat, the risk of a false verdict may be worth taking for the social benefit of the therapy. That is the policy rationale for the holding in *Jaffee*.

But this is a case where the threat was understood by the psychiatrist to be so serious as to require disclosure, and she had disclosed what her patient told her. The confidentiality of the therapeutic relationship had already been breached, and the patient knew it. Where disclosure was necessary, the social interest in assuring that the judge and jury know the whole truth greatly exceeds the value of preserving any remaining shreds of the confidential therapeutic relationship. The jury ought, in such circumstances, to know the truth about what Chase said. The cat being already out of the bag, trial is no occasion for stuffing it back in.

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[25] *Id.* § 2286 at 531.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. STEVEN GENE CHASE, *Defendant-Appellant.*	No. 01-30200 D.C. No. CR-99-60113-MRH OPINION

Appeal from the United States District Court
for the District of Oregon
Michael R. Hogan, Chief District Judge, Presiding

Argued and Submitted
May 6, 2002 – Portland, Oregon

Filed August 21, 2002

Before: Stephen S. Trott and Thomas G. Nelson, Circuit Judges, and Milton I. Shadur,* District Judge.

Per Curiam Opinion;
Dissent by Judge Shadur

COUNSEL

Brett A. Purtzer, Law Offices of Monte E. Hester, Inc., P.S., Tacoma, Washington, for the defendant-appellant.

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* The Honorable Milton I. Shadur, Senior United States District Judge for the Northern District of Illinois, sitting by designation.

Michael W. Mosman, United States Attorney, and Jeffrey J. Kent, Assistant United States Attorney, Eugene, Oregon, for the plaintiff-appellee.

OPINION

PER CURIAM:

Steven Gene Chase ("Chase") timely appeals his jury conviction for violating 18 U.S.C. § 115(a)(1)(B) ("Section 115(a)(1)(B)") by threatening to murder federal law enforcement officers who were preparing to execute a search warrant on his home. Chase contends that the trial court erred (1) when it permitted his psychiatrist, in contravention of the psychotherapist-patient privilege, to give testimony on information she had learned during her therapy sessions with him, and (2) when it allowed the jury, in violation of Fed. R. Evid. ("Rule") 404(b), to hear testimony about asserted threats that Chase had made about individuals other than the federal law enforcement officers.

We hold that the district court correctly found that the psychiatrist's testimony was not barred by the psychotherapist-patient privilege, and that the court did not err in admitting evidence of other threats. Accordingly, we affirm the district court's judgment.

I

BACKGROUND

In 1997 Chase began receiving treatment for irritability, anger symptoms, and depression from psychiatrist Kay Dieter at a clinic in Salem, Oregon. Chase, who was

receiving Social Security disability benefits due to his mental and physical problems, was later diagnosed with a bipolar type II disorder with episodes of intense anger and obsessive rumination against certain individuals. Chase met with Dr. Dieter every few months for counseling and medication management, seeing Psychologist Robert Schiff more frequently for psychotherapy. From the beginning of his treatment with Dr. Dieter, Chase had expressed anger and threats toward a number of people associated with his former business and legal proceedings. Chase exhibited a great deal of volatility during his therapy sessions, sometimes contrasting anger with mildness during the same session and often reflecting a sharp change in that respect from one session to the next.

During an August 18, 1999 counseling session, Chase showed Dr. Dieter his appointment book containing a list of names, addresses and social security numbers of people Chase had encountered in his business and legal dealings, including two FBI agents who had been assigned to investigate complaints that he lodged. Chase confided to Dr. Dieter that he had thoughts about injuring or killing those people and that he had threatened several of them on occasion during the previous five years. He also told Dr. Dieter that he had begun drinking.

As a result of that meeting Dr. Dieter became concerned about the possibility that Chase might act on his threats, although when she confronted him with her concerns Chase denied any intention to take immediate action. Dr. Dieter warned Chase that if he told her specifics about whom he planned to kill she would have a duty to alert those people. Following that meeting Dr. Dieter discussed with her supervisor her concerns as to Chase's ongoing threats and whether she had a duty to warn

Chase's potential targets. Her supervisor suggested that she attempt to obtain more information from Chase before taking any action.

Dr. Dieter next spoke with Chase on October 18, when he called her to confide that he was extremely upset about an argument he had just had with his wife. During that conversation he also mentioned that his life insurance policy would pay off if anything should happen to him, a statement that caused Dr. Dieter to fear that he was losing his support system. Later that day Dr. Dieter again consulted with a supervisor and with the clinic's legal counsel, who instructed her to get in touch with the police department in the town where Chase lived. Dr. Dieter did that the next day, and on October 25 she heard from the FBI. She disclosed to FBI agents the threatening statements Chase had made during the therapy sessions and described whom he had threatened. Her supervisors instructed her to cooperate further by attempting to elicit more information about Chase's plans during their next appointment on October 27.

At that appointment Dr. Dieter said nothing to Chase about her conversations with the authorities. Chase reported another fight with his wife and the fact that his mother had just been diagnosed with cancer. He continued to express his frustration with the legal system and said that if a lien against his house was not dropped by the time he met with his attorney the following Tuesday (November 2), "he would get his guns, get in his vehicle and have himself some justice." Chase told Dr. Dieter that he had located all but four of the people on his list and was targeting their children as well. Dr. Dieter again warned Chase about her obligation to alert Chase's intended

targets, and Chase assured her that he would not act on any of his impulses.

FBI Agent Donald McMullen ("McMullen") spoke with Dr. Dieter on October 28, telling her that because of the information she had provided, the FBI was planning to interview Chase at his home and to execute a search warrant for weapons and for Chase's appointment book containing the names of his targets. Later that day Dr. Dieter received several voice mail messages from Chase indicating that he believed he was about to be arrested. Apparently Chase had received a telephone call from a neighbor who asked him why United States Marshals were questioning her about him and talking about arresting him. Chase spoke also with two of the clinic's telephone operators, telling one of them that "there are FBI Marshals that are on their way out to get me and if that happens, people are going to die." Dr. Dieter did not return Chase's calls, but she did call McMullen to warn him that Chase was aware that law enforcement people were coming.

After arriving outside of Chase's home, McMullen stopped Chase's wife from entering the home, and, in a series of cell phone negotiations involving Chase, his wife, and Chase's attorney, arranged for Chase to leave his gun on a table and step outside of his home. Chase then walked into his yard, assisted McMullen over a retaining wall, and permitted McMullen to handcuff him without incident. Chase told McMullen about the gun he had left on a table and the location of his appointment book, but he did not mention two other firearms hidden in the home. Chase said that when he told the clinic operator that people were going to die if the Marshals came to his home, he meant that *he* was going to die. Chase also referred to

the statements he made to Dr. Dieter about killing people as "hypothetical."

Chase was arrested and charged on three counts: (1) threatening to murder federal law enforcement officers preparing to execute a search warrant at his home in connection with the statement he made to the clinic operator on October 28, (2) threatening to murder the FBI agents who in his view had failed properly to investigate his complaints, and (3) possession of firearms by a person adjudicated by the Social Security Administration as a mental defective. The last charge was subsequently dismissed by the district court.

Before trial, Chase challenged the admissibility of (1) Dr. Dieter's testimony about statements he had made during their counseling sessions and (2) evidence of threats he had made against individuals other than federal law enforcement officials. In holding Dr. Dieter's testimony admissible, the court concluded that the psychotherapist-patient privilege did not apply because Dr. Dieter had properly determined (1) that Chase's threats were serious when uttered, (2) that harm was imminent, and (3) that disclosure to authorities was the only means of averting the threatened harm. As for the evidence of other threats related to the charge in Count II, the court deferred ruling until the trial, at which time it held that the evidence was admissible under Rule 404(b) as relevant to Chase's intent to retaliate against the agents for what he perceived to be their failure to take proper official action against his antagonists against whom he had filed complaints alleging federal offenses. We note that the defense did not request that Count I be severed from Count II for trial. The evidence in question can be summarized as follows:

- Parveen Gupta, Chase's former business associate, testified that Chase had enlisted the assistance of the police to carry out a meritless citizen's arrest of Gupta and his wife.
- Alex Myers, the Guptas' attorney, testified that Chase had played with a gun's magazine clip and its bullets (there was no gun involved – just the clip and bullets) while Myers took his deposition.
- Don Dickman and Ronald Palmeri, attorneys for Chase's former employee, testified about Chase's threatening and erratic behavior during the course of a lawsuit that the employee had filed against him.
- Monica Stauss, Dickman's secretary, testified that she had received a threatening telephone call from Chase.
- Sarria Hodge, a paralegal for one of Chase's former attorneys, testified that Chase had shown her a gun and threatened to "blow away" the sheriff, his wife's ex-husband, his former attorney and the entire law office.
- Two attorneys of Chase's wife's ex-husband testified that Chase knew personal information about them.
- Greg Kennedy, Chase's wife's ex-husband, testified that Chase possessed a handgun, had threatened to kill him, had made numerous false accusations about him to government entities and had vandalized and keyed Kennedy's car and that Chase "got back at" Kennedy's sister by naming her as a defendant in a lawsuit.

- John Beaudin, a private investigator, testified that Chase had hired him to find Kennedy and to locate the home of one of Kennedy's attorneys.

After deliberation, the jury convicted Chase on Count I and acquitted him on Count II.

II

STANDARDS OF REVIEW

We review de novo rulings by a trial court on the scope of a privilege. *Oleszko v. State Comp. Ins. Fund,* 243 F.3d 1154, 1156 (9th Cir.) *cert. denied,* 122 S.Ct. 208 (2001). We also review de novo the question whether particular evidence falls within the scope of Rule 404(b). *United States v. Smith,* 282 F.3d 758, 768 (9th Cir. 2002). When evidence falls within Rule 404(b), we review for abuse of discretion a district court's decision to admit that evidence under Rule 403. *Id.*

III

ADMISSIBILITY OF DR. DIETER'S TESTIMONY

Jaffee v. Redmond, 518 U.S. 1 (1996), confirmed that a psychotherapist-patient privilege exists under federal common law. *Jaffee* held "that confidential communications between a licensed psychotherapist and her patients in the course of diagnosis or treatment are protected from compelled disclosure under Rule 501 of the Federal Rules of Evidence." 518 U.S. at 15. While *Jaffee* left the delineation of the scope of that privilege to future cases, it noted:

> Although it would be premature to speculate about most future developments in the federal

> psychotherapist privilege, we do not doubt that there are situations in which the privilege must give way, for example, if a serious threat of harm to the patient or to others can be averted only by means of a disclosure by the therapist.

Id. at 18 n.19.

While we have not previously considered the meaning of that footnote,[1] other circuits that have done so have reached opposite conclusions. In *United States v. Glass,* 133 F.3d 1356, 1360 (10th Cir. 1998), the Tenth Circuit recognized a "dangerous patient" exception to the privilege – one that permits a therapist to disclose a threat if "the threat was serious when it was uttered and . . . its disclosure was the only means of averting harm . . . when the disclosure was made." In contrast, the Sixth Circuit has refused to recognize a dangerous-patient exception to the federal evidentiary privilege. *See United States v. Hayes,* 227 F.3d 578, 584-87 (6th Cir. 2000). The Sixth Circuit articulated a distinction between the professional duty a therapist may have to warn the target of a patient's threats and the evidentiary privilege that prevents the therapist from testifying about such threats in a later prosecution. In so doing, *Hayes* read the *Jaffee* footnote as "no more than an aside by Justice Stevens to the effect that the federal psychotherapist/patient privilege will not operate to impede a psychotherapist's compliance with the

[1] *Oleszko,* where we held that the psychotherapist-patient privilege extended to communications between employees and Employee Assistance Program counselors, is the only case in which we have addressed the scope of the psychotherapist-patient privilege enunciated in *Jaffee. Oleszko,* 243 F.3d at 1159.

professional duty to protect identifiable third parties from serious threats of harm," and not as marking out an exception to the evidentiary privilege. *Id.* at 585.

We find the *Hayes* dissent more persuasive than the majority opinion or the like position taken by the Oregon Supreme Court in *State v. Miller,* 709 P.2d 225, 236 (Or. 1985).[2] *See Hayes,* 227 F.3d at 587-89. Just as the ethics of the profession recognize a "dangerous patient" exception to the psychotherapist's obligation of confidentiality that permits disclosure of otherwise-confidential information when (1) a threat of harm is serious and imminent and (2) the harm can be averted only by means of disclosure by the therapist, we hold that the same exception extends to the psychotherapist's permitted testimony under the same circumstances. This holding is faithful both to the *Jaffee* footnote and to the obvious policy considerations that underlie it.

At oral argument, Chase conceded that the privilege includes a dangerous patient exception but argued that the exception did not apply to this case because the threat was not immediate and because alternate means existed

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[2] *Miller* recognized much the same distinction as did *Hayes* between a therapist's duty to warn a potential victim and the evidentiary privilege preventing disclosure of confidential information at trial. It should be noted, however, that the Oregon Supreme Court rested its decision in material part on the legislature's having enacted a specific crime-fraud exception to the attorney-client privilege, while creating no such exception to the psychotherapist-patient privilege. In any event, while *Jaffee* commented on the desire for comity between state and federal law on issues of privilege, it confirmed that it is of course federal common law and not state law that governs evidentiary privileges. *Jaffee,* 518 U.S. at 12-13. We hold Dr. Dieter's testimony admissible under federal common law.

for Dr. Dieter to avert harm. In response the government contends that Dr. Dieter's disclosure and subsequent testimony were proper because all evidence suggested that Chase imminently planned to murder many people and because reporting that to authorities was the only possible way to avert that harm.[3]

Following a hearing on the issue, the district court found that Chase presented imminent danger of causing serious harm to others and that Dr. Dieter's disclosure to authorities was the only means of averting that harm. That corresponds directly to the dangerous patient exception to the privilege, and our de novo review of the record compels us to affirm those findings. Although Chase's expressed hostility toward many individuals throughout the course of his treatment with Dr. Dieter had never resulted in his acting out any threats, Dr. Dieter could reasonably have viewed its most recent manifestations as posing a more serious problem. Chase had shown her the list of names in his appointment book, had told her about steps he had taken to track down his victims, had mentioned his

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[3] In its brief the government also urges that we find Chase's statements admissible under the crime-fraud exception to the privilege as recognized by *In re Grand Jury Proceedings (Gregory P. Violette),* 183 F.3d 71, 72 (1st Cir. 1999). That argument fails because the crime-fraud exception as articulated in *Violette,* paralleling the crime-fraud exception that we have recognized in attorney-client privilege cases, applies only to communications that are intended "to promote a particular crime or fraud" – "directly to advance a particular criminal or fraudulent endeavor" – instead of serving the goals of legitimate therapy. *Violette,* 183 F.3d at 77; *see also United States v. Alexander,* 287 F.3d 811, 816-17 (9th Cir. 2002) (analyzing the crime-fraud exception in the context of attorney-client privilege). Here Chase's statements to Dr. Dieter were nothing of the sort – rather they were well within the scope of legitimate therapy.

life insurance policy and had described other stresses in his life, including alcohol consumption and arguments with his wife.

We need not decide here what will suffice to lower the bar for admissibility of a psychotherapist's testimony as to otherwise privileged communications – for example, whether the psychotherapist's subjectively perceived prospects of imminent harm could be adequate, or whether instead such perception must be objectively reasonable. Those boundaries for operation of the *Jaffee* footnote are better left for future case development. For the present it is enough to say that Dr. Dieter's view of the situation can fairly be considered to have been reasonable in itself.

Without conceding harm was indeed imminent, Chase argues that other means of averting potential harm were available – most notably involuntary civil commitment. Dr. Dieter testified that she considered initiating civil commitment procedures but concluded that it was unlikely that Chase would be held for longer than 72 hours due to his lack of a committable mental illness. Dr. Dieter was also concerned about a prior threat Chase had made to harm himself or clinic staff if any attempt were made to hospitalize him against his will. Thus, we find that Dr. Dieter reasonably considered disclosure to law enforcement authorities to be the only effective means of averting harm. We therefore affirm the district court's findings and hold that Dr. Dieter's testimony about information regarding the charged threat that she learned during Chase's

therapy sessions was not protected by the psychotherapist-patient privilege.[4]

IV

ADMISSIBILITY OF EVIDENCE OF OTHER THREATS

Chase contests also the decision of the district court to admit evidence of threats Chase made against individuals other than federal agents. Chase argues that the evidence is of "other acts" than those charged in the underlying offenses and was therefore inadmissible under Rule 404(b) because the acts "were used to infer that [he] had a propensity to commit the crime charged, which is an improper use of such evidence." We respectfully disagree.

To counter the argument that evidence of other threats was inadmissible under Rule 404(b), the government contends that the rule is irrelevant here because the "other act" evidence was "inextricably intertwined" with the underlying offense and therefore exempted from Rule 404. Like other courts, we have recognized the potential inapplicability of Rule 404(b) in situations involving inextricably intertwined evidence. *United States v. Matthews,* 240

[4] We therefore find it unnecessary to reach the government's further argument that Chase would have forfeited the privilege in any event by consenting to the release of his medical information for insurance and disability benefits purposes or by failing to heed Dr. Dieter's warnings of her obligation to disclose. In that respect, parenthetically, we consider such arguments as more precisely framed in terms of forfeiture than waiver, though the latter word is employed by the government: "Waiver" denotes the voluntary surrender of a right or privilege, which was certainly not the case here.

F.3d 806, 817 (9th Cir. 2000), adopted by, 278 F.3d 880, 884 (9th Cir.) (en banc) *cert. denied,* 122 S.Ct. 2345 (2002). Two types of "other act" evidence fit that description: (1) evidence of part of the transaction on which the criminal charge is based and (2) evidence required "to permit the prosecutor to offer a coherent and comprehensible story regarding the commission of the crime." *Id.* (quoting *United States v. Vizcarra-Martinez,* 66 F.3d 1006, 1012-13 (9th Cir. 1995)). As we have explained, a jury "cannot be expected to make its decision in a void – without knowledge of the time, place, and circumstances of the acts which form the basis of the charge." *Vizcarra-Martinez,* 66 F.3d at 1013 (internal quotations omitted).

A.

The first key to understanding Judge Hogan's well supported and careful decision to allow into evidence the disputed testimony is to recognize why Chase was angry at the F.B.I. agents. His intent to retaliate against them stemmed directly from his anger at the people entangled in his affairs who, for one warped reason or another, he did not like. The F.B.I. agents became involved in this thicket only because Chase tried unsuccessfully to enlist their official support to investigate his foes. To quote from the Government's Optional Trial Memorandum in support of the admissibility of this evidence,

> Thus, the evidence above explains why Chase wanted to kill the two FBI agents on his target list – in Chase's view, for the failure to adequately investigate and prosecute his enemies who he now intended to kill.
>
> All of these matters also are probative whether a reasonable person (here, the FBI

> agents) would take the threats against them seriously. *See United States v. Orozco-Santillan,* 903 F.2d 1262, 1265 (9th Cir. 1990).

One can only understand this case by comprehending this fact: No problems with his antagonists, no retaliation against the F.B.I. The government made this abundantly clear in a lengthy discussion with the court concerning the relevance and admissibility of the evidence, starting first with an explanation of the threat alleged in Count II of the indictment:

> BY MR. KENT (the prosecutor): And I want to read from [Count II], because I – I think it sets out what our theory of the threat is.
>
> We were asked, what was the time period of the threats against the FBI agents? We indicated it would be sometime during or after the defendant's first known contact with the FBI on October 24, 1995, requesting the FBI to investigate the Guptas for bankruptcy fraud, and continuing during FBI Special Agent Gordon McDonald's oversight of an investigation of defendant's bankruptcy attorney, Elizabeth Levine, regarding allegations of bankruptcy fraud, and during and/or after Special Agent David McLean's August 25, 1998, interview of the defendant in connection with that investigation. The identity of the agents are Gordon McDonald and David McLean.
>
> The threats were witnessed by Dr. Kay Dieter throughout the period of her treatment which the defendant expressed, which raged against the FBI agents for not adequately responding to his demands that the Guptas and Levine be investigated and charged with bankruptcy fraud. Dr. Dieter, of course, testified at the

recent evidentiary hearings and provided further insight in the nature of these threats.

It would also be the government's theory that Agents McDonald and McLean appeared on the defendant's hit list, along with other agents, or along with other targets, whom the defendant targeted for a variety of reasons, and that he intended to kill all the people on that list including the agents.

Now, up until really now, we have not been able to review, in any significant way, the material from Dr. Dieter's file. So, you know, we're – we assume, consistent with her testimony at that motion to suppress, that she will testify that one of the areas of anger for Mr. Chase was his frustration that the FBI Agents McDonald, and to a lesser extent, McLean, had not acted sufficiently on information that he provided regarding misconduct of others. So that's the threat we're talking about.

THE COURT: In count –

MR. KENT: Or threats, you know.

THE COURT: – two?

MR. KENT: In count two. I mean, in other words, my belief is that Dr. Dieter would testify that, as was true with the Guptas, as was true with McHann, as was true with Levine, that he fixated on the failure of the FBI agents, particularly Gordon McDonald, to investigate and prosecute these, in quotes, federal crimes that he brought to their attention. And he showed Dr. Dieter a list that included the agents' names as among the people he intended to go out and kill if things didn't go his way that week in court.

> So that is the nature of the threat that we expect to prove. We expect that it would have been repeated time and again to Dr. Dieter in the course of her – in the course of her treatment of Mr. Chase.

Later, the prosecutor recapitulated for the court the essence of his case:

> You know, that's it in a nutshell, Your Honor, as far as how we intend to establish why Mr. Chase intended to threaten and kill, first the Guptas, who he complained to the FBI about; then McHann, who he complained to the FBI about; then Kennedy, who he complained to the FBI about; and then Levine, who the FBI was already investigating in connection with Chase's bankruptcy. And when nothing was done, in the view of Mr. Chase, to kill the FBI agents themselves who appear on the list.

B.

The second key to analyzing the admissibility of the disputed evidence is found in 18 U.S.C. § 115(a)(1)(B), the statute under which Chase was prosecuted and convicted. The statute makes it a crime for a person to threaten to assault a federal law enforcement officer "with *intent to retaliate* against such . . . officer on account of the performance of official duties. . . ." § 115(a)(1)(B) (emphasis added). "Retaliate," is defined as "to return like for like," or "to return evil for evil." Webster's Third New International Dictionary 1938 (1976). How can anyone determine accurately whether and why Chase spoke with the "intent to retaliate" against these agents without knowing what he was retaliating against and its connection to the agents'

official duties? This statute explicitly makes the reason for the threat an essential ingredient of the offense.

C.

Judge Hogan demonstrated during the pretrial conference a thorough grasp of (1) the issues in this case, (2) what the government had to prove, which included an intent to retaliate, and (3) his responsibility to protect the defendant from improper evidence:

> BY JUDGE HOGAN: Now, let's get to the other counts. To prove the threat counts, the government must prove that in the District of Oregon the defendant first threatened to assault, kidnap or murder; second, a federal law enforcement officer; three, with the intent to impede, intimidate, interfere with, or retaliate against that officer; and, four, while the officer was engaged in or on account of performance of his official duties.
>
> I've taken the elements in this case from United States versus Orozco-Santillan. Now, whether a particular statement may properly be considered a threat is governed by an objective standard; and that is, whether a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of intent to harm or assault. And the only intent requirement is that the defendant intentionally or knowingly communicate the threat, not that he or she intended or was able to carry it out.
>
> *The state of mind and actions of a person being threatened, taken in response to the threats, is highly relevant as to whether the threats could*

reasonably be construed as containing a threat of injury.

But the threat need not necessarily be expressly communicated to the object of the threat. Only that that would have been a reasonable consequence.

The threat – alleged threat need be such that a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of an intention to inflict bodily harm or take the life of the object of the threat.

Now, this – because intent here will be a principal question for the jury, evidence related to that threat, because it was a threat allegedly, *this alleged threat was allegedly made against government agents because they were not taking appropriate action with regard to other situations involving the defendant, and so on that issue of intent, the other situations are relevant.*

And while it may not be utilized to prove a propensity to crime, only concerning intent, the challenge before us is appropriately limited 404(b) evidence and *balancing it with 403* to allow the government to tell the story but not to take focus off what the alleged threat here is.

We're not going to, in other words, try a lot of threats, we're going to try one threat.

And we'll go into the other information with the government only insofar as it may be useful in proving intent upon the threats that are charged in the indictment.

> Now, I'd be happy to have – so we're going to have to look at that evidence in advance here. And I'd be happy to – Mr. Kent, for you to give me a suggestion on the most economical way to do that.

(emphasis added).

The defense recognized the relevance of this disputed evidence, suggesting an alternative method to bring it to the attention of the jury, a method later partially embraced by the court:

> MS. McCREA (defense counsel): If the government needs to show and is entitled to show that there was a *background which would relate to Mr. Chase's intent toward these two particular FBI agents, the two FBI agents Gordon McDonald and David McLean* are listed as witnesses for the government, certainly they could come in and testify regarding the bankruptcy fraud investigation of Elizabeth Levine, the other bankruptcy fraud claims against the Guptas, McHann, and Kennedy initiated by Mr. Chase, and give the jury that background themselves in, arguably, a detached, neutral and professional fashion, instead of hashing up and rehashing these previous litigations.

(emphasis added). At another point, Ms McCrea said, "So some background would clearly be appropriate, but without going into all of the hysterical emotional aspects."

At the conclusion of counsels' presentations on this issue, Judge Hogan exhibited again his command of the situation:

> THE COURT: Ms. McCrea, some of this – I'm going to allow at least some of this evidence

> as intent evidence or having to do with the issue of intent. And what I do invite you to do is to draft a form of jury instruction to caution the jury against its misuse. And I can go ahead and do that myself by writing something extraneously, but I invite you to do so if you want to, because it is material that could be misused, and I think the warning ought to be rather strong.

Judge Hogan adopted the defense's suggestion that much of the disputed evidence would come in through the F.B.I. agents in summary fashion:

> THE COURT: We're going to handle the 404(b) evidence as follows: I prefer to be able to give you rulings on each item of evidence before we actually start the trial. I'm not able to do that here, but I am going to order much of what was summarized in the proffer is relevant on the issue of intent. Some of it is not. What I am going to do is require the government to put on the FBI agents who were working these issues before the other witnesses. And I will limit the other witnesses if they begin to get cumulative of the FBI material. If there is information that the agents cannot testify to, then I may allow some evidence from other witnesses. And so I would expect much of this material to come in in summary fashion, and from those named FBI agents.
>
> MR. KENT: Gordon McDonald and Agent McLean?
>
> THE COURT: Uh-huh.

Given the language of the statute under which Chase was charged in Count II, there is no principled way to see this disputed evidence of motive and purpose as not relevant; it is inextricably intertwined with Chase's ire

against the FBI agents, who had rejected all his unfounded referrals, and with his threats against them. Retaliation was the focus of Count II. It is as simple as this: the retaliation of today cannot be shown without proof of what happened yesterday when the person making the threat was allegedly wronged by the person threatened. This evidence was the very essence of the charge described in Count II, and it illuminates Chase's intent with respect to Count I.

D.

But, the story of Judge Hogan's proper exercise of his discretion is far from over. Contemporaneously with the admission of the disputed evidence during the trial, he carefully admonished the jury as to the limited use to which it could be put:

> I do want to make a comment to the jury.
>
> I told you about the alleged threats that are being prosecuted by the government here. Now, it's the government's theory – we've heard – that at least some of those *threats were in retaliation, kind of a retaliatory threat because the FBI didn't do enough about other situations, including the one you are hearing about now.* But this case is not about whether this witness was threatened or these other situations. This is about whether the government agents were threatened. And I'm only allowing this evidence on these unrelated matters insofar as it may offer something useful to you concerning the defendant's intent, which is something the government is required to prove in the case.
>
> All right. Go ahead, Mr. Kent.

(emphasis added).

Before he submitted the case to the jurors for their decision, Judge Hogan repeated again these instructions:

> Testimony that has been excluded or stricken or that you have been instructed to disregard is not evidence and should not be considered. In addition, some testimony and exhibits have been received only for a limited purpose. *Where I have given a limiting instruction, you must follow it. . . .*
>
> You have heard evidence of other actions, encounters, or statements by the defendant. This evidence is not proof of the crimes charged. You may consider this evidence only as it bears on defendant's *motive or intent and for no other purpose.*
>
> The defendant is on trial for the charges in the superceding indictment, not for any other activities. You are here only to determine whether defendant is guilty or not guilty of the charges in the superseding indictment. The defendant is not on trial for any other conduct or offense not charged in the superseding indictment. You should consider evidence about the acts, statements and intentions of others, or evidence about other acts of the defendant, only as they relate to these charges against this defendant.

(emphasis added).

Then, Judge Hogan gave the jurors an instructional statement of the law, to which there is no objection on appeal:

> A threat is an expression of an intention to inflict evil, injury, or damage on another. *Alleged*

> *threats should be considered in light of their entire factual context, including the surrounding events and reaction of the listeners.*
>
> Whether a particular statement may properly be considered to be a threat is governed by an objective standard, whether a reasonable person would foresee that the standard would be interpreted by those to whom the maker communicates the threat as a *serious expression of intent to harm or assault.*
>
> The defendant must intentionally or knowingly communicate a threat, but the government need not show that the defendant intended or was able to carry out the threat. It is not required that the defendant communicate the alleged threats to the objects of the alleged threats. *It is, however, necessary for the government to prove that the defendant intended to impede, intimidate, interfere with, or retaliate against the object of the alleged threats.*

(emphasis added). This correct statement of the law, taken from the statute and from our opinion in *United States v. Orozco-Santillan,* 903 F.2d 1262 (9th Cir. 1990), puts an end to any claim that the disputed evidence was not relevant.

It was for this reason, grounded in the statute itself, that we said in *Orozco-Santillan* that "[a]lleged threats should be considered in light of their entire factual context, including the surrounding events and reaction of the listeners." 903 F.2d at 1265. Reducing this abstraction to the facts, we then said in that case that in order to decide whether what Orozco-Santillan said was a threat, his utterances "must be considered in context. Vela had arrested Orozco-Santillan and subjected him to deportation

proceedings. In these circumstances a rational jury could conclude that Orozco-Santillan's statement made on the telephone was a threat." *Id.* at 1266.

V

CONCLUSION

We affirm the district court in all respects. The district court's decision concerning the admissibility of Dr. Dieter's testimony was correct, as was its decision to admit the evidence of Chase's confrontations with others.

AFFIRMED.

SHADUR, District Judge, dissenting in part:

Because I read the record through a very different lens than do my colleagues, I respectfully dissent as to the affirmance of the conviction as discussed in Part IV of the per curiam opinion (Parts I through III accurately reflect my own views on the aspects of the case that are dealt with there). When the evidence and the prosecutor's closing argument are placed alongside the charge in Count I – the only criminal charge of which Steven Chase ("Chase") stands convicted – I believe that Chase received a profoundly unfair trial on that count.

Whenever a criminal defendant confronts multiple charges, just as whenever multiple defendants confront the same charge, a jury is asked to conduct what amounts to multiple simultaneous trials. In that respect the district judge here properly charged the jury with the standard instruction that is Ninth Circuit Model Instruction 3.12:

> A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count.

But unfortunately the vast bulk of the trial testimony and the overwhelming majority of the prosecutor's closing argument were devoted to wrongs and acts other than the threat that was the gravamen of Count I – wrongs and acts that demonstrated Chase to be a thoroughly unpleasant man but did not qualify as proper Fed. R. Evid. ("Rule") 404(b) evidence *on that count.* And although we always presume that juries heed and abide by cautionary instructions, what was totally absent here was any instruction that such evidence – carrying as it did the high potential for unfair prejudice, the potential for its being treated as "bad man" character evidence that Rule 404(b) is intended to keep out of a criminal case, lest a defendant be convicted for things that he or she has done other than the express charge at issue – should not be considered on the Count I charge.

It may be, as the majority opinion states, that the overwhelming mass of evidence of other threats and vengeful statements by Chase that were introduced by the government was admissible to show his *motive* for the Count II charge of retaliation against FBI agents. Indeed, what strikes me as extraordinary about the majority opinion is that its entire substantive discussion – the reference to "inextricably intertwined" evidence, the extended quotation from the prosecutor's statement of his theory of prosecution and the equally extended quotation from the district judge's pretrial conference statement – relates exclusively to Count II, *not* to Count I (which is the only charge before us). All that is said about Count I is this

(after referring to the massive evidence of Chase's other threats and statements, none of which he ever acted on):

> This evidence was the very essence of the charge described in Count II, and it illuminates Chase's intent with respect to Count I.

But significantly, the jury acquitted Chase on Count II even in the face of that "other acts" evidence – though what flaw the jury found in the government's proof on that charge we cannot know, because jury deliberations are secret. And that made it all the more important that the jury be told properly of the limitations on the use of such evidence as between the two charges. On that score the district judge mistakenly held only that the evidence was admissible under Rule 404(b) as relevant to Chase's *intent,* contrary to this Circuit's teaching as to the only intent that is required to be shown when a defendant is charged under 18 U.S.C. § 115(a)(1) with making a threat (*United States v. Orozco-Santillan,* 903 F.2d 1262, 1265 n.3 (9th Cir. 1990) and cases cited there) – and, moreover, that ruling was made without the district judge's having engaged in the required Rule 403 balancing analysis as to Count I.

It is really impossible to overstate the extent of the resulting imbalance as to Count I, which must be the focus of our present review. Most of the evidence at trial (and indeed the conduct by Chase that the prosecutor first mentioned in his opening statement, and to which he devoted the bulk of his closing argument even before he turned to the claimed threats against the officers on which the indictment was based) related not to Count I's charged offense, but rather to the "other acts" category that looked to Rule 404(b) for admissibility as to Count II. Because that evidence has been set out at the end of Part I of the

per curiam opinion, it suffices here simply to recite the parade of witnesses whose testimony was presented to the jury with no indication of its lack of relationship to Count I: Gupta, Myers, attorneys Dickman and Palmeri and two other attorneys, Stauss, Hodge, Kennedy and Beaudin. And as I have said earlier, that same imbalance marked the prosecutor's closing argument, with the bulk of his emphasis being devoted to matters other than Count I's actual charge of threats against the law enforcement people.

That being the case, the jury was bombarded with volumes of irrelevant evidence that painted a detailed picture of Chase as an individual who has a propensity to threaten others. No fewer than 14 of the government's 22 witnesses testified about Chase's threats other than the ones charged, and the prosecutor heavily emphasized that evidence in his opening statement and closing argument instead of focusing on the evidence directly relevant to the actual threats charged in the two counts. And the government left no doubt as to its reason for that emphasis – here is the prosecutor's pretrial statement stressing the desire to prove *why* Chase had uttered (though he had never acted on) those other threats that were not a component of the charged offense (emphasis added):

> *We intend to establish why Mr. Chase intended to threaten and kill, first the Guptas,* who he complained to the FBI about; *then McHann,* who he complained to the FBI about; *then Kennedy,* who he complained to the FBI about; and *then Levine,* who the FBI was already investigating in connection with Chase's bankruptcy. And when nothing was done, in the view of Mr. Chase, to kill the FBI agents themselves who appear on the list.

All of that being so, I believe that the overwhelming amount of that propensity evidence more probably than not compromised the jury's ability to assess reliably the one question that it needed to answer to decide whether Chase was guilty of the Count I charge: Would a reasonable person have foreseen that Chase's October 28 telephone statement would be interpreted as a real threat (in *Orozco-Santillan* terms) by the person who heard it? And to me that propensity evidence cannot qualify as harmless error as to the only count at issue. "Harmless error" is a concept developed by appellate courts to embody and implement the truism that no litigant is assured of a perfect trial, but only a fair one (a doctrine applicable to criminal and civil trials alike – *see, e.g., United States v. Hastings,* 461 U.S. 499, 508-09 (1983); *McDonough Power Equip., Inc. v. Greenwood,* 464 U.S. 548, 553 (1984) and cases cited there).

Harmless error analysis, when applied to the improper admission of evidence at trial, normally involves minor surgery – the figurative excision of such testimony by scalpel, followed by an examination of the remaining evidence to see whether the same result would assuredly follow. Here the figurative excision would extend to the elimination of the bulk of the corpus via meat cleaver, so that it is particularly appropriate for a jury and not a reviewing court to evaluate the remaining (and untainted) evidence.

Some errors will almost inevitably occur in the pressure cooker that typifies virtually every contested trial, and it would be impossible to administer a judicial system in which every trial court error, no matter how minor or how noncritical to the outcome, would automatically trigger a new trial (let alone a reversal). But what I

believe plainly emerges from the transcript here is that the district judge's improper admission of such a large body of "other acts" evidence coupled with the manner in which the prosecutor capitalized on that situation by focusing primary attention on how bad a person Chase was, rather than on the charged offense, rendered Chase's trial on Count I fundamentally unfair for the reasons I have set out here. Essentially Chase was ultimately tried on, and his Count I conviction inexorably flowed from, actions and unconsummated threats other than those charged in the indictment. And that to me takes the harmless error doctrine out of play.

Hence I believe that Chase's Count I conviction should be reversed and the case should be remanded for a new trial free of the taint described here. As stated earlier, I respectfully dissent on that ground.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA, Plaintiff, v. STEVEN EUGENE CHASE, Defendant.	Cr. No. 99-60113-HO ORDER (Filed Mar. 22, 2000)

Defendant is charged with threatening to murder federal law enforcement officers and as being a person adjudicated as a mental defective in possession of firearms. Defendant moves to suppress (and makes a motion in limine) certain statements he made to his psychotherapist (#28) asserting the psychotherapist-patient privilege. Defendant also moves to suppress statements he made to the FBI during the execution of a search warrant. (#36).

BACKGROUND

Defendant has been receiving psychotherapy since 1995 and is also on a number of medications for his mental illness (Bipolar II). Dr. Kay Dieter, defendant's treating psychiatrist, contacted the Corvallis police department on October 19, 1999, regarding statements made by defendant. Dr. Dieter also contacted the FBI on October 25, 1999, regarding defendant's alleged threats to kill. The threats purportedly included threats against judges and law enforcement officials.

In her contacts with the FBI, Dr. Dieter agreed, on the advise of her supervisor, to ask defendant specific questions about who he intended to kill, how, and when in an effort to evaluate the seriousness of the threats. On October 27, 1999, Dr. Dieter met with defendant and then disclosed information obtained in this session to the FBI. It should be noted that on [sic] least four occasions during the course of his treatment, Dr. Dieter warned defendant that she may have to disclose his threatening statements despite the confidential nature of their relationship.

On October 28, 1999, a raid on defendant's home was planned. On this date, defendant allegedly left a threatening message ("people are going to die" when federal marshals arrive to arrest him) on Dr. Dieter's answering machine. Dr. Dieter again called the FBI.

Just prior to their arrival to conduct the search, the FBI and U.S. Marshals learned that defendant had been warned of their impending arrival. FBI Special Agent Don McMullen waited outside the residence and observed defendant's wife arrive. Mrs. Chase facilitated a three way conversation between defendant, his attorney and McMullen. McMullen discovered that defendant had a gun. Defendant eventually agreed to put down his gun and exit the house.

Defendant helped McMullen onto the driveway over a retaining wall. McMullen then immediately placed defendant in handcuffs. The FBI advised defendant that he was being investigated for threats to kill federal officers and that a search warrant had been issued. The FBI also offered defendant the opportunity to direct agents to the items listed in the warrant to avoid disturbance of the house. Defendant made many statements in response,

including statements regarding the location of some of the items listed in the warrant.

McMullen quickly looked inside the home to note the location of any weapons and saw a semiautomatic handgun lying on a dining table along with a loose stack of hollow point ammunition. McMullen returned to defendant and displayed a copy of the warrant. Defendant was formally placed under arrest. At that point, defendant's neighbor and attorney in this case approached and told defendant he was done talking. Defendant was not advised of his Miranda rights and no further statements were made.

DISCUSSION

Motion to Suppress/In Limine (#28)

Defendant moves for an order that defendant's statements to Dr. Dieter were protected from disclosure and can not be used in these proceedings against him and that further disclosures should be limited.

Fed. R. Ev. 501 provides:

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of

> a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

The Supreme Court has accepted the psychotherapist-patient privilege:

> Because we agree with the judgment of the state legislatures and the Advisory Committee that a psychotherapist-patient privilege will serve a "public good transcending the normally predominant principal of utilizing all rational means for ascertaining the truth . . . we hold that confidential communications between a licensed therapist and her patients in the course of diagnosis or treatment are protected from compelled disclosure under Rule 501.

Jaffee v. Redmond, 518 U.S. 1, 15 (1996). The Court noted that given the importance of a patient's understanding that his communication with his therapist will not be disclosed, any State's promise of confidentiality would be undermined if the privilege would not be honored in federal court. *Id.* at 13. Thus, defendant argues that this court should follow Oregon law and determine that the confidentiality between a psychotherapist and her patient is protected even regarding communications of future crimes.

In *State v. Miller*, 300 Or. 203, 216 (1981), the Oregon Supreme Court did reject the crime fraud exception to the privilege. "The legislature specifically provided an exception to the attorney-client privilege for client's communications about future crimes (OEC 503(4)(a)), but failed to do so for the psychotherapist-patient privilege. This suggests that the legislature has struck the balance in favor of protecting communications to psychotherapists, even when harm is

threatened." *Id.* The government argues that the legislature has since amended the privilege so as to include this exception. However, the amendment merely provides a *nonexclusive* list of the limits of the privilege that relate to court ordered examinations or where the patient puts his mental health at issue. The government focuses on the word nonexclusive and infers that the legislature meant to overrule the *Miller* court and provide for a crime fraud exception. However, courts generally presume that the legislature knows of existing case law and if it intends to overrule it, it would do so explicitly or by overwhelming implication. Because the legislature did not mention the crime fraud exception the court presumes that *State v. Miller* is still good law with respect to this issue. As the *Miller* court noted:

> It is important to distinguish between the evidentiary privilege which is claimed by a patient, or a psychotherapist in behalf of a patient (OEC 504(3)), to prevent disclosure of confidential information at trial, and the discretionary authority of a public health care provider [footnote omitted] or any ethical obligation that a licensed psychotherapist may have to notify the police or other proper authority in order to aid a victim or warn of future dangerousness. The public interest to be served by notifying the police, in most cases, could be achieved by divulging only that information needed to show why a clear and immediate danger is believed to exist. It would rarely justify the full disclosure of the patient's confidences to the police, and never justify a full disclosure in open court, long after any possible danger has passed.

Miller, 300 Or. at 215-16.

The discussion of the Oregon court's treatment of the privilege is largely academic however. With respect to the federal crimes charged in this case, federal law governs evidentiary privileges. Rule 501 states that the federal common law applies.

There is very little case law concerning the subject. However, the *Jaffe* Court has provided sufficient guidance on the matter:

> Although it would be premature to speculate about most future developments in the federal psychotherapist privilege, we do not doubt that there are situations in which the privilege must give way, for example, if a serious threat of harm to the patient or to others can be averted only by means of a disclosure by the therapist.

Jaffee, 518 U.S. 18, n. 19. Thus, regardless of whether Oregon Law is viewed as providing a crime fraud exception, the federal common law does. The privilege must be examined on a case-by-case-basis. *Id.* at 18.

The court plays a gatekeeper role in this regard. Under Rule 104(a) the court can determine preliminary questions of the existence of a privilege. In this context, the privilege is trumped when the patient makes a threat that is serious at the time it is uttered and when its disclosure by the psychotherapist is the only means of averting harm. *Cf. United States v. Glass*, 133 F.3d 1356, 1360 (10th Cir. 1998) (remand to determine if threats towards the President were serious and disclosure was the only means of averting harm).

At oral argument, Dr. Dieter testified that threats against various individuals, including federal law enforcement officials, were made over a long period of time

during her treatment of defendant. Defendant not only made the threats but demonstrated to Dr. Dieter the seriousness of these threats by taking steps in preparation to carry out the threats such as compiling a list of names, addresses, photos, and in one instance obtaining the security code to a security gate of one of the intended targets. Dr. Dieter recounted trips that defendant had taken which she believed were in preparation for carrying out the threats. Dr. Dieter also recalled how other circumstances in defendant's life creating stress led her to conclude that the threats were not only serious, but that harm was imminent. It was the cumulative effect of her encounters with defendant and his worsening mental condition that led her to contact law enforcement on October 19, 1999. The court finds that Dr. Dieter, in her experience, properly concluded that the threats were indeed serious at the time they were uttered and that harm was imminent.

Whether disclosure to law enforcement was the only means to avert the harm presents complicated issues for a psychiatrist in Dr. Dieter's position. Dr. Dieter's testimony demonstrates this was not a decision she made lightly. Dr. Dieter was questioned regarding whether involuntary commitment procedures could have sufficed. In her experience with defendant, she concluded that such procedures would not have sufficed to avert the harm short of disclosure.[1] The court finds that disclosure by Dr. Dieter was the only means to avert the threatened harm.

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[1] There was an issue made of whether Dr. Dieter properly understood the procedures underlying involuntary commitment. The court finds that the procedures available would require at least some

(Continued on following page)

The motion to suppress statements defendant made to his psychiatrist regarding threats is denied. While the Court has recognized an evidentiary privilege regarding confidential communications made between a patient and his psychotherapist under Rule 501, such privilege does not apply with respect to the threats disclosed by Dr. Dieter. The privilege does not extend to communication of serious threats when disclosure of such communication is the only means of averting harm.

Of course the privilege does not extend to disclosures which are not necessary to prevent harm. The government indicated its intention to seek to introduce evidence, at trial, regarding communications made in the context of the threats. The court finds that the threats themselves are admissible into evidence, but declines to rule as to contextual communications at this time. As the case develops, and if the government seeks to introduce any statements beyond the threats themselves, the court will make a determination of the necessity of such disclosures.

Motion to Suppress Statements (#36)

Defendant also moves to suppress the statements he made to the FBI at the time of his arrest. During the relevant time period, defendant was advised of his Miranda rights.

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disclosure and likely involve law enforcement to capture defendant. Dr. Dieter testified that defendant made it clear that he would never be committed to a hospital again and that any efforts to have him committed would be met with violent resistence.

When defendant was handcuffed, a special agent advised him that a search warrant authorized a search of his home for firearms, ammunition, and documentation relating to his threats against federal officials. When so informed, defendant offered statements as to the whereabouts of these items. Defendant even offered that certain incriminating statements the officers were looking for were on the last couple of pages of his day planner. Defendant also stated that what he meant in the phone message when he stated that people were going to die if federal marshals tried to arrest him was that he was referring to himself. The issue is whether these statements were the result of interrogation or voluntarily offered.

Agent McMullen merely told defendant about the items in the search warrant and defendant volunteered all of the information. The information was not elicited through interrogation. Interrogation is either express questioning or its functional equivalent. *Rhode Island v. Innis*, 446 U.S. 291, 300-01, (1980). The term "interrogation" under Miranda refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that police should know are reasonably likely to elicit an incriminating response. *Id.* at 301. The definition of interrogation can extend only to words or actions on the part of police officers that they should have known were reasonably likely to elicit an incriminating response. *Id.*

Law enforcement must provide a copy of the warrant to the occupant of the house. Fed. R. Crim. P. 41(d); *United States v. Gantt*, 194 F.3d 987, 1001 (9th Cir. 1999) (requires service of the warrant at the outset of the search on persons present at the search of their premises). All of the statements made by defendant were merely in response to McMullen's

presentation of the items listed in the warrant. Therefore, defendant's motion to suppress statements made during the execution of the warrant is denied.

CONCLUSION

For the reasons stated above, defendant's motions to suppress (#s 28 and 36) are denied. With regard to the motion in limine, the court will determine the full extent of the admissibility of statements made to defendant's psychiatrist as the need arises.

DATED this 22nd day of March, 2000.

/s/ Michael R. Hogan
United States District
Judge

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. STEVEN GENE CHASE, Defendant-Appellant.	No. 01-30200 D.C. No. CR-99-60113-MRH ORDER (Filed Oct. 6, 2003)

Before: SCHROEDER, Chief Judge, Pregerson, T. Nelson, Kleinfeld, Thomas, Graber, McKeown, W. Fletcher, Fisher, Gould and Clifton, Circuit Judges.

A majority of the en banc court has voted to deny the Petition for Rehearing. The Petition for Rehearing is therefore DENIED.

[1] IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	NO. CR 99-60113-HO
vs.	)	May 31, 2000
STEVEN GENE CHASE,	)	Eugene, Oregon
Defendant.	)	

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE MICHAEL R. HOGAN
UNITED STATES DISTRICT COURT JUDGE

- : -

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[2] (Wednesday, May 31, 2000; 9:40 a.m.)

PROCEEDINGS

THE CLERK: This is the time set for oral argument of motions and pretrial conference in United States of America versus Steven Gene Chase, 99-CR-60113.

THE COURT: Good morning, Counsel. I have reviewed the material from the hospital, and there is a copy here for each of you.

In giving this to you, that does not indicate that I believe it is all admissible. In fact, I do not.

I've tried to review it with an eye toward admissibility. And I've gone through it all, but I do think it's – given my allowing the psychiatrist to testify about the alleged threat, I think it certainly is discoverable.

I also have reviewed a transcript of a cassette tape. I didn't listen to it. And if you have any – I'll trust you've done that. And if you have any questions about the accuracy of the transcript, tell me, and I'll be happy to listen.

MR. KENT: We have not heard it or seen it.

THE COURT: You have not seen it or heard it?

MR. KENT: Correct.

THE COURT: I believe that that is also discoverable by the – of course the defendant already [3] has it. Do you have a copy there?

MR. RICH: Yes, Your Honor.

THE COURT: Give a copy to Mr. Kent, please.

There are a number of matters you probably want to address, and some that I do, why don't you go over – of course, I have your motions, but are there other matters that we need to address today? And by the way, if we don't get finished this morning, we'll take this up at 1:30. I have some sentences to fit in.

So do you have anything to sort of talk through so we can be ready for trial? Right now I feel like we have quite a few loose ends to gather up.

MR. KENT: Your Honor, one matter, as far as the insurance file is concerned, the court indicated that it intended to exclude that. We have filed a supplemental waiver argument that readdresses that.

We also believe, at the very least, some of the documents establishing the fact of disability insurance and the payments ought to come into evidence, even separate from the psychiatric documents.

I mean, our position is that he's waived the psychotherapist privilege in general as exhibited by the form that was attached to our pretrial memorandum. But that at the very least the entire file should not be excluded. We should be able to establish that he [4] applied for and received mental disability insurance and was being paid a certain amount per month.

THE COURT: All right.

MR. KENT: That's another matter that I want to put on the table.

THE COURT: Thank you. Ms. McCrea?

MS. MCCREA: An additional issue, Your Honor, is I'm moving to dismiss count two. And I didn't file a formal motion regarding that on Friday because I didn't know if I had all the discovery from the government at that point. I received approximately four inches of discovery on Friday as well as the government's exhibit book at 4:30 in the afternoon.

After reviewing all of those materials, I am still not satisfied with the government's response concerning the timing of the alleged threats pursuant to my request in the bill of particulars. And I won't argue it now, but simply indicate to the court that that's another issue as to count two.

THE COURT: All right. I think – Let's take up count three first.

Mr. Kent, tell me how you intend to prove count three.

MR. KENT: Your Honor, we intend to prove count three by establishing that Mr. Chase applied to [5] Social Security for disability payments based upon a mental disability, that he was reviewed by various psychological and psychiatric personnel, and they concluded that he had – he was suffering from a severe depression. I think they called it an Axis I Disorder. And that he also suffered from extreme anger and rumination issues.

I don't know exactly what rumination means in a psychiatric sense, but I can at least hypothesize that I assume that what it meant he was not only angry, but he was ruminating or thinking about acting out on his anger, because the reports indicate that he – the psychiatric and

psychological reports indicated that he harbored homicidal thoughts against his perceived enemies.

Now, Your Honor, I had occasion to take a look at the defense motion that was filed. And it would be our position that since that 1973 Eighth Circuit case was decided, ATF passed regulations that we cite in our pretrial memoranda in which a – it says under Social Security – first of all, the Social Security Act indicates that a person who is considered disabled, if he is unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which has lasted or can be [6] expected to last for not less than 12 months.

ATF regulations provide further to federal firearms licensees – actually, I think it's actually a regulation for those who sell firearms, that adjudicated as a mental defective includes a determination by a board, commission or other lawful authority that a person as a result of mental illness and competency, condition or disease, is a danger to himself or to others, or lacks – or lacks the mental capacity to contract or manage his own affairs. That's cited – or quoted on pages 2 to 3 of our pretrial memo.

We submit, Your Honor, that – as we argued there – that Mr. Chase qualifies in both respects; that he was determined by a lawful authority, namely the Social Security Administration, to suffer from a mental illness and disease that made himself a danger to himself, and certainly to others, and that he lacked the mental capacity to contract or manage his own affairs.

And I may have misstated myself, Your Honor. I want to distinguish between the Social Security – what the Social Security law says and what the ATF regulations say.

That the Social Security Act indicated that he's unable to engage in substantial gainful activity by reason of a medically determinable physical or mental [7] impairment.

The ATF regulations indicate that adjudicated as a mental defective includes the determination by the board that a person as a result of mental illness or disease is a danger to others or lacks the mental capacity to contract or manage his own affairs.

And the Social Security findings and basic statutory mandate is satisfied in both respects.

So, you know, going to the heart of what I sense is the court's issue is what does adjudicated as a mental defective mean, and how do we intend to prove it?

THE COURT: Yes, that's my question.

MR. KENT: It would be in that method.

THE COURT: All right. Fine. Now, is there further argument on this count by the defendants?

MS. MCCREA: If I could have just a minute, Your Honor.

THE COURT: You may.

MS. MCCREA: I submit that the defense position is well laid out in the motion and the attachment memorandum. I don't mean to repeat that for the court.

I also submit that Exhibit A to the government's pretrial memorandum on various legal issues is supportive of the defense position, that this was not [8] an adjudication, nor was Mr. Chase found to be a mental defective.

Further, I would point out to the court that the government's own proposed Exhibit 41-D is a form from July 18th, 1997, where, as the government says in its second amended exhibit list, Dr. Lahman indicates that Mr. Chase is, quote, capable of handing [sic] Social Security funds, unquote, which clearly indicates that he's not lacking the mental capacity to contract or manage his own affairs.

And our position would be that the ATF regulation is not the same as a Social Security determination, nor can the government show that – I guess let me phrase it this way: The factor of the person being a danger to himself or others is so vague as to be without assistance to the court or the parties.

And even if we accepted that as part of the factor for the analysis, there was a lack of sufficient notice to Mr. Chase in order for him to be able to comply if that was in fact the standard which was to be utilized.

So for all the reasons that we set out and for what I've said here today, our position is that the government cannot prove the necessary elements of count three and it should be dismissed.

[9] MR. KENT: Your Honor, if I could just briefly make an additional point based upon what Ms. McCrea just said.

I don't quite understand the defense's position that Mr. Chase was not provided with some form of due process relating to this. He wanted exactly what Social Security gave him, which was essentially a declaration that he suffered from such mental disability that he was unable to manage his own affairs. So I really don't understand the

relevance of a claim that he wasn't provided with some form of due process regarding the consequences of his application.

THE COURT: Okay. David.

(Discussion held off the record.)

THE COURT: With regard to count three, in order to prove this count, the government would have to prove the following by proof beyond a reasonable doubt:

That in the District of Oregon the defendant knowingly possessed a firearm or ammunition; that the firearm or ammunition had been shipped or transported from one state to another, or a foreign country to the United States; and at the time the defendant possessed the firearm or ammunition, the defendant had been adjudicated as a mental defective.

The problematic area is the last, the [10] adjudication as a mental defective.

The government seeks to rely on a Social Security determination that the defendant is entitled to benefits because he is unable to work, perform substantial gainful work activity in the national economy, which is the charge of the Social Security Administration.

There is – defense argues that this is not a determination. It is a determination. The question is what it determines. There is little case law on whether a determination by an administrative agency if the person is entitled to disability benefits due to a mental condition, and that this should be considered, this adjudication, as a mental defective, as the statute here requires.

The government – I did some research into the legislative history. And, frankly, it is not determinative. I think it best to rely just on the words of the statute itself.

It is true that ATF regulations at 27 CFR Section 178.11(a) defines adjudicated as a mental defective several ways, one of which a determination that a person is a danger to himself or to others, or lacks the mental capacity to contract or manage his own affairs. I do not believe that Social Security [11] finding fits that description, even if this is what Congress meant when it included the language adjudicated as a mental defective.

And with regard to the Hansel case, the Eighth Circuit case, I, frankly, don't buy all of the logic of that case, but I don't think it's necessary to defer that. I just, frankly, believe that a Social Security determination is not a determination that fits any of these definitions. And, therefore, the motion to dismiss count three is granted.

Now, let's get to the other counts. To prove the threat counts, the government must prove that in the District of Oregon the defendant first threatened to assault, kidnap or murder; second, a federal law enforcement officer; three, with the intent to impede, intimidate, interfere with, or retaliate against that officer; and, four, while the officer was engaged in or on account of performance of his official duties.

I've taken the elements in this case from United States versus Orozco-Santillan. Now, whether a particular statement may properly be considered a threat is governed by an objective standard; and that is, whether a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression [12] of intent to

harm or assault. And the only intent requirement is that the defendant intentionally or knowingly communicate the threat, not that he or she intended or was able to carry it out.

The state of mind and actions of a person being threatened, taken in response to the threats, is highly relevant as to whether the threats could reasonably be construed as containing a threat of injury.

But the threat need not necessarily be expressly communicated to the object of the threat. Only that that would have been a reasonable consequence.

The threat – alleged threat need be such that a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of an intention to inflict bodily harm or take the life of the object of the threat.

Now, this – because intent here will be a principal question for the jury, evidence related to that threat, because it was a threat allegedly, this alleged threat was allegedly made against government agents because they were not taking appropriate action with regard to other situations involving the defendant, and so on that issue of intent, the other situations are [13] relevant.

And while it may not be utilized to prove a propensity to crime, only concerning intent, the challenge before us is appropriately limited 404(b) evidence and balancing it with 403 to allow the government to tell the story but not to take focus off what the alleged threat here is.

We're not going to, in other words, try a lot of threats, we're going to try one threat.

And we'll go into the other information with the government only insofar as it may be useful in proving intent upon the threats that are charged in the indictment.

Now, I'd be happy to have – so we're going to have to look at that evidence in advance here. And I'd be happy to – Mr. Kent, for you to give me a suggestion on the most economical way to do that.

MR. KENT: Your Honor, I spent some time basically outlining the essence of what the testimony would be from the various perceived enemies of Mr. Chase. What I would suggest is perhaps by proffer what I expect that information to be based upon my and Agent Barrett's visit with a number of these people down in California the week before last. And we have the phone numbers of all of these people, pursuant to the [14] court's request. And if the court wants more specifics, they will be available by telephone.

THE COURT: All right. Is that satisfactory, Ms. McCrea?

MS. MCCREA: At the present time, it is, Your Honor.

THE COURT: All right. Thank you.

MR. KENT: May I be seated, Your Honor?

THE COURT: Yes, you may.

MR. KENT: Your Honor, I break the – shall we say the areas of anger of Mr. Chase into some four, maybe five categories. The first one involves the Guptas.

MR. RICH: Your Honor, I don't want to interrupt here, because it's kind of unrelated, but I think we really need to make a distinction before we go down these paths as to the intent as to which threats we're talking about, because there is a threat in count one, which would have a different intent than the threat in count two.

At this point you talked about a particular statement being a threat, and we have no idea what particular statements we're talking about in count two. So there is no way for us to formulate whether the intent was – what the intent was at the time the [15] statement was made, because we don't know what the statement was, or when it was made, and that's what we've been asking for in the bill of particulars.

So before we go into this, it's very hard for us to argue about intent and what this shows if we're talking about the alleged threat on the day of his arrest, or some other threat that we have no idea even what it was.

So that's a problem that we're faced with at this point, that I think as kind of a preliminary hurdle we need to cross before we go down the path of looking at the evidence.

MR. KENT: Do you want me to address that, Your Honor?

THE COURT: Yes.

MR. KENT: Your Honor, I did have occasion to review our response to the bill of particulars. And we did file two different responses. One to the first indictment, and another to the superseding indictment, which included count two. And I want to read from it, because I – I think it sets out what our theory of the threat is.

We were asked, what was the time period of the threats against the FBI agents? We indicated it would be sometime during or after the defendant's first known [16] contact with the FBI on October 24, 1995, requesting the FBI to investigate the Guptas for bankruptcy fraud, and continuing during FBI Special Agent Gordon McDonald's oversight of an investigation of defendant's bankruptcy attorney, Elizabeth Levine, regarding allegations of bankruptcy fraud, and during and/or after Special Agent David McLean's August 25, 1998, interview of the defendant in connection with that investigation. The identity of the agents are Gordon McDonald and David McLean.

The threats were witnessed by Dr. Kay Dieter throughout the period of her treatment which the defendant expressed, which raged against the FBI agents for not adequately responding to his demands that the Guptas and Levine be investigated and charged with bankruptcy fraud. Dr. Dieter, of course, testified at the recent evidentiary hearings and provided further insight in the nature of these threats.

It would also be the government's theory that Agents McDonald and McLean appeared on the defendant's hit list, along with other agents, or along with other targets, whom the defendant targeted for a variety of reasons, and that he intended to kill all the people on that list including the agents.

Now, up until really now, we have not been [17] able to review, in any significant way, the material from Dr. Dieter's file. So, you know, we're – we assume, consistent with her testimony at that motion to suppress, that she will testify that one of the areas of anger for Mr. Chase

was his frustration that the FBI Agents McDonald, and to a lesser extent, McLean, had not acted sufficiently on information that he provided regarding misconduct of others. So that's the threat we're talking about.

THE COURT: In count –

MR. KENT: Or threats, you know.

THE COURT: – two?

MR. KENT: In count two. I mean, in other words, my belief is that Dr. Dieter would testify that, as was true with the Guptas, as was true with McHann, as was true with Levine, that he fixated on the failure of the FBI agents, particularly Gordon McDonald, to investigate and prosecute these, in quotes, federal crimes that he brought to their attention. And he showed Dr. Dieter a list that included the agents' names as among the people he intended to go out and kill if things didn't go his way that week in court.

So that is the nature of the threat that we expect to prove. We expect that it would have been repeated time and again to Dr. Dieter in the course of [18] her – in the course of her treatment of Mr. Chase.

And I might indicate, Your Honor, that one of the things that became more clear when we took the trip to California, too, is that Mr. Chase had provided information on the Guptas. He was questioned regarding Levine, who was his bankruptcy attorney. He also provided information regarding McHann that he wanted investigated, a former employee. And he included information regarding a Kennedy, the ex-husband of his wife, who he also wanted investigated by the FBI. So there was a whole range of areas of dissatisfaction that he kept on referring

these matters to the FBI, and in his view they did not adequately investigate them. So that's what we expect the essence of count two to be.

THE COURT: All right.

MR. RICH: We still don't have a particular threat, Your Honor. And when we look back to the grand jury testimony that was presented in order to get an indictment in this case, we have Agent Barrett saying, Dr. Dieter doesn't recall any specific threats regarding the FBI. We also have the reports dated 10/25/99 –

THE COURT: I'm going to interrupt you, because I have read the medical records, and I have read the transcript of the cassette tape. And while I agree with regard to count two, there is still some questions [19] remaining, until both of you have a chance to really look at these documents I've given you, I don't think you can make as informed arguments as you could otherwise.

I think there are questions as to count two that don't exist as to count one. I think that there is – whether the threat should have – makes the intent element another question. But with regard to count one, in other words, the alleged threat to kill people coming to execute a search warrant or to arrest the defendant, we don't have the – given the testimony of Dr. Dieter and my previous findings, there is not the problem of the admissibility of the threat when faced with the privilege. There is not the problem of the specifics of the threat.

MR. RICH: No, it's a very simple case.

THE COURT: It is. And with regard to count two, frankly, I think you both need to look through this material before you can make your best argument. I

probably can anticipate them, frankly, because I've read the things.

MR. RICH: So have we.

THE COURT: Have you read all the medical records?

MR. RICH: Yep.

[20] THE COURT: Well, the government should have the opportunity to do that. And then we can make a determination as to whether it's possible to prove count two. I have some questions about that still.

MR. RICH: I just – I thought it would be helpful to talk about which count we're talking about the intent issue when we're going through all the evidence, because I think some of it would clearly be relevant to count one, some of it would clearly not be relevant to count one.

THE COURT: I'm not – let's find out. Let's go ahead with the proffer. Okay.

MR. RICH: Thank you.

MR. KENT: Your Honor, what we expect the evidence to establish regarding the Guptas, and as I've indicated in my filings, I am trying to present this in the most basic way possible without getting into the merits of who was right and who was wrong in the specific litigation, but essentially the Guptas had a business relationship with Mr. Chase and his company, Chase Pacific.

Mr. Chase acted as a broker where he was selling computer-related materials that were being packaged by Saicom, which was a company owned by the Guptas. According to the Guptas, he fell behind in his [21] payments.

Accounts receivables reached a level of over $80,000. And he was advised that – he was advised that unless he was to pay on a cash basis in the future, there would be no further credit transactions.

Apparently there was an incident that occurred where the Guptas observed Mr. Chase and some of his employees removing things from the warehouse of Saicom and – very early in the morning, and suspected that a theft had taken place or was in the process of taking place.

Mr. Gupta wrote a letter to Mr. Chase and basically said, you know, unless you – in essence, unless you return the items that were being taken without payment, it will be necessary for us to contact the police.

And as the litigation evolved, eventually the Guptas filed suit, received a – if not a judgment, something in the nature of a judgment. One of the things that got slightly confusing here is that at a certain point in time the Guptas' suit against Mr. Gupta – or against Mr. Chase was brought into bankruptcy, because Mr. Chase declared bankruptcy in the midst of that litigation.

At any rate, the Guptas had something in the nature of an $83,000 judgment against Mr. Chase. They [22] continued to run their business and they indicated – or they were doing business with a company by the name of Data Envelope. Data Envelope, unbeknownst to them, had recently been purchased by Mr. Chase. They sent a $2,500 check to Data Envelope, who was one of their vendors. And while that check was en route, they discovered that Mr. Chase, who in their mind owed them $83,000, owned Data Envelope, and they stopped payment on that check.

Mr. Chase responded by persuading the Fremont California Police Department, with the assistance of his lawyer Elizabeth Levine, to arrest the Guptas on a citizen's arrest basis at 10 o'clock on a Sunday night.

And the Guptas were actually taken out of their house and taken down to the police station where one of the supervising police personnel released them without jailing them. Later, the DA's office evaluated the case and no files – or no charges were filed. It was ruled that there was insignificant evidence of criminal intent.

Now, during the course of the litigation with the Guptas, there was a deposition taken by a lawyer by the name of Alex Myers from Los Altos.

MS. BARRETT: Yes.

MR. KENT: Yeah, from Los Altos, California, [23] who was representing the Guptas. And in the course of that deposition, Mr. Chase began to fondle a magazine – a firearm magazine, which led to a lengthy exchange as to whether or not Mr. Chase was attempting to intimidate and threaten Mr. Myers. There was a long inquiry as to whether or not Mr. Chase had a gun and so on and so on. But it obviously gives great insight into the intensity of Mr. Chase's emotions surrounding this particular suit.

Also in the course of this litigation, I indicated that the case was transferred into bankruptcy because Mr. Chase filed bankruptcy. He originally filed Chapter 7, which allowed him to continue to run the company. The trustee that was appointed, along with the attorney, concluded that, given the assets of the company and given the way it had been run, that there was – it should be a

Chapter 11. Basically the company should be run by the trustee rather than Mr. Chase.

Eventually the bankruptcy trustees determined that there was a very large amount of money that had essentially gone out the back door of that company, and reached an agreement with Mr. Chase personally where he signed a $140,000 – an agreement for $140,000 that that trust would be reimbursed, I think it was at $10,000 per month for a certain period of time.

[24] No payments were made, and eventually the bankruptcy trustee and attorney acquired a $140,000 judgment against Mr. Chase and placed a lien against his home.

THE COURT: Are you sure it wasn't filed as an 11 and then 7?

MR. KENT: And then a 7? Maybe it was.

MS. BARRETT: It was 7 and then it went to 11.

MR. KENT: No, it was a 7, which I think allowed the – allowed Mr. Chase to continue to run the company, and the trustees declared an 11. I have the bankruptcy documents. At least that's as how it was explained to me. Let me see here.

THE COURT: It's not that significant now. Go ahead.

MR. KENT: Okay. It says conferred case to Chapter 7. Order granting trustees' motion to convert case to Chapter 7. You are right, Your Honor. I had that mixed up. So it went from an 11 to a 7.

The – in the course of – or after the Guptas were arrested under the citizen arrest – citizen's arrest, they filed a false arrest suit, which was eventually settled for $100,000 in their favor. That is the essence of what we would hope to elicit through the Guptas' part of the evidence.

[25] Now, the second part of the evidence, the second arena, involves a lady by the name of Rita McHann. Rita McHann was one of Mr. Chase's employees at Data Envelope, the company that Mr. Chase purchased, you know, at some time – I'm not sure if it was after he owned Chase Pacific or during the time that he owned it.

At any rate, Ms. McHann was some type of salesperson in the operation. She had a very difficult pregnancy going. And eight months into her pregnancy, I think they determined that it was necessary, for a variety of serious medical reasons, to terminate the pregnancy.

Before – and it would be her position that she kept personnel advised. And as she was to seek a six-week or maybe eight-week disability period while this took place, she was terminated, and her medical benefits were apparently lost in the process.

She eventually filed suit for unlawful termination. And after a series of – after a series of continuances, or at least a couple of continuances, in which Mr. Chase sought continuances for various reasons, including his mental condition, eventually the court became disenchanted with the case being continued and entered a default judgment of $268,000 against, I think, Mr. Chase and Data Envelope.

[26] I the course of – in the course of – or after that judgment was acquired, there were letters sent to Ms. McHann's attorney by the name of Mr. Palmeri, which had quite an angry tone to them. And one of the things that appeared to be an arguable tactic of Mr. Chase with the attorneys of his perceived enemies was that he would let them know that he knew some personal things about them. And, for example, with Mr. Palmeri, he told him in the letter something to the effect as a graduate of Saint –

MS. BARRETT: Saint George.

MR. KENT: – Saint George Law School, or one of the law schools down there, that's a theme that seems to run through the relationship between Mr. Chase and the attorneys.

Eventually a lien was filed against his property. And in time, after Mr. Chase moved to Oregon, an effort was made to enforce what was now over a $300,000 judgment against the Chases' bank accounts and his home.

Again, in the course of all of this, as was also true with the Guptas, Mr. Chase demanded that the FBI investigate first the Guptas for bankruptcy fraud, and Ms. McHann for potential federal embezzlement charges relating to misuse of a credit card.

[27] A lawyer in Corvallis by the name of Don Dickman was handling the enforcement action. And there came a time where a very nasty phone call came from someone identifying himself as Steven Chase, and basically told the office manager of Dickman's office or his legal assistant, Ms. Stauss, that – something to the effect that they better watch themselves, they better not turn their backs.

Now, if I could just step back for a second, Your Honor. There is a target list in this case, which includes a number of people. It's our theory that the target list – the target list contains people with whom Chase had a grievance and who he perceived as in some way to be the object – justifiable object of his anger. The Guptas appear on that list. Alex Myers, who represented the Guptas, appears on the list. The bankruptcy trustee and the bankruptcy trustee's attorney, who procured the $140,000 judgment, which – which also became a filed lien, are also on the list.

MS. MCCREA: Excuse me, is that one of the exhibits?

MR. KENT: Yes, I'm – I was just asking Agent Barrett to find which one it is. It's the whole book.

MS. MCCREA: We'd like –

MR. KENT: The exhibit book – Is there [28] something funny?

MR. RICH: Yeah, the whole book isn't the list.

THE COURT: Counsel, please address yourself to me.

MR. KENT: Yeah. So it was one of the seizures from the – it's in the 1999 calendar book that was seized as part of the search warrant execution. And it's actually been attached to certain filings of mine, including the memo – the memo relating to documents. And I'm going – I'm going to let Agent Barrett find that while I continue.

At any rate, as we go through – as we go through the various pieces of litigation, there will be – as briefly as we can, there will be certain common denominators. There

will be complaints to the FBI. In my memorandum regarding documents submitted in camera, Exhibit A, there is the target list.

MS. MCCREA: Well, Exhibit A references four pages. Is the representation that that whole four pages –

MR. KENT: The first page.

MS. MCCREA: The first page is the list the government is referring to?

MR. KENT: Well, I mean, that's the one we're [29] referring to right now. The other portions, obviously, contain personal information concerning people that appear on the first page.

MS. MCCREA: So the page 1 of Exhibit A is what the government has referred to as the target list?

MR. KENT: Well, this is what I'm referring to the target list right now, but I'm not going to – I'm not going to exclude all four pages, which are 46, 52, 56, and 57 of the 1999 book.

At any rate, if the court were to refer his – the court's attention to the top of what was Government Exhibit A in that particular filing, and does the court have it?

THE COURT: Yes.

MR. KENT: Katy Meador was the trustee of the bankruptcy. Ron Oliner is the attorney for the bankruptcy trustee. Don Dickman is the Corvallis attorney who was executing on the McHann judgment. I want to restrict it at this stage to people relating to this particular litigation. If we go down towards the bottom, we will see Rita McHann, Parveen Gupta, Manjula Gupta and –

(Discussion off the record between Mr. Kent and Ms. Barrett.)

MR. KENT: Actually on page 2 of that is also [30] Alex Myers, and his – that would be page 2 of Exhibit A in that particular filing.

Now, if we could go on next to the Kennedys, which are a Greg and Kimberly Kennedy. Mr. Chase established a relationship with Michele Kennedy, which eventually led to the Kennedys being divorced. Michele Kennedy, I guess, took her maiden name for a while, was Michele Jewell, and eventually became, although it's still a little unclear, Michele Chase.

During the divorce proceedings, an incident occurred where Mr. and Mrs. Kennedy – Mr. Kennedy now being with Kimberly Kennedy, who became his wife – and they were concerned that a three-year-old girl – the three-year-old daughter of Mr. Kennedy and his former wife, Michele, was complaining that Steven was sexually – well, didn't put it in those terms, but indicated that Steven had done things to her that may have constituted sexual abuse.

The matter was investigated. And, again, without getting into the merits of these various items of litigation, there was no sexual abuse charges filed, but there appeared to be some justifiable concern on the part of Mr. and Mrs. Kennedy for having investigated it. This upset Mr. Chase very much, and he filed a defamation suit, along with various other charges, [31] against the Kennedys, or at least Greg Kennedy.

In the course of the divorce and post divorce, Greg Kennedy himself was forced to file bankruptcy, and Mr.

Chase filed a declaration contesting the validity of Greg Kennedy's bankruptcy.

Mr. Chase also filed complaints against the nursing board. Mr. Kennedy was a – was a nurse and also worked on some paramedic type activities. He filed a complaint against the nursing board. He filed a long package with the local district attorney. And he referred matters to the FBI regarding the legitimacy of Greg Kennedy's bankruptcy. The Kennedys became sufficiently concerned about the intensity of Mr. Chase's anger that they moved to a place which they had hoped they would be able to keep a secret.

The – Mr. Chase hired a private investigator by the name of John Beaudin to find the Kennedys' new, secret address. And Mr. Beaudin eventually provided him with information regarding the basic location of Kennedys' new address.

At the same time in the theme of going after not just – or being upset not just with his perceived enemies, but also his perceived enemies' attorneys, he also had the PI find the home address of Mr. Kennedy's attorney in the defamation suit. And the PI will [32] testify that he provided Mr. Chase with the home address of Dewey Wheeler, a lawyer in Walnut Creek, and provided him with his home address.

During one of the depositions, Dewey Wheeler and Michael Walton were working on the case. He was being paid by an insurance company, I guess Mr. Kennedy's home owner's insurance company. And during the course of that suit, there was another, shall we say, deposition incident in which Mr. Walton was taking Mr. Chase's deposition, it went into after hours, and Mr. Chase and

Mr. Walton were among the last people to leave the building, and blood was found by the janitorial staff, and noted by the officer manager, all over the bathroom wall when they came in the next day.

There were also instances in this case where Mr. Chase communicated to Mr. Walton that he knew certain personal things about him. He knew his Social Security Number, maybe his date of birth, maybe a few other things. I don't remember exactly all the different items.

He also sent a letter to Mr. Wheeler, the person whose home address he wanted from the PI, which again had a very angry tone, and made mention of Mr. Wheeler's law school. Again communicating to these attorneys that he was arguably probing into certain [33] background information.

Now, if we go back to the list, the target list, Exhibit A – oh, I should indicate in here that Mr. Chase, during this period of time, was represented by an attorney by the name of Rand Stephens. And he represented Mr. Chase in the defamation suit. And there came a time where Mr. Chase and Mr. Stephens had a parting of the minds on what was appropriate in the way of future litigation after various dismissals of counts or other aspects of the suit that he had filed against the Kennedys.

And Mr. Stephens' office thereafter suffered through a series of threats. One in which Sarria Hodges, who is the paralegal for that office, received a call from Mr. Chase saying that he was coming down to blow them all away. None of the lawyers were in the office at the time. Ms. Hodges indicated that she would – she reached Mr. Stephens by cell phone, and he ordered the office closed for

the entire afternoon, from like 2 o'clock on, and sent the staff home.

There were other instances of threats that were communicated. And, finally, Mr. Stephens sent a communication to Mr. Chase indicating that if he were to come by to pick up various files, he was to give them adequate notice so that they could call the police in on [34] a civil stand-by basis while the files were removed.

Now, if we go through the target list again. You will see Sarria Hodges, who is the paralegal, towards the middle, you will see Rand Stephens, who was his attorney, you will see Michael Walton and Dewey Wheeler, who were the attorneys of the Kennedys, right, you will see Greg Kennedy and you will see Kimberly Kennedy.

MS. BARRETT: And –

(Discussion off the record between Mr. Kent and Ms. Barrett.)

MR. KENT: Right. And also as somewhat part and parcel of that litigation, there was a process server by the name of Roy Gillespie, where there was some controversy and potential dissatisfaction around whether or not he effectively served the relocated Kennedys in connection with part of that suit.

Now –so we've talked about the Guptas. We've talked about McHann. We've talked about the Kennedys. There was also an attorney by the name of Elizabeth Levine, who was hired by Mr. Chase to assist him in various litigation, with the Guptas and the actual filing of the bankruptcy.

There came a time where Mr. Chase actually turned over the operation of his company, I think it was [35] the Data Envelope company, to Elizabeth Levine. And allegations were made both by the bankruptcy trustee and the bankruptcy trustee's attorney, that Attorney Levine – Attorney Levine and an attorney by the name of Eisen were essentially raiding Chase Pacific's assets for purposes of – and thereby evading the interest of the creditors, to the extent that the bankruptcy trustee and the bankruptcy trustee attorney sent the matter to the FBI for further investigation.

There was eventually a falling out between Mr. Chase and Ms. Levine. And Ms. Levine apparently had encouraged Mr. Chase to take some time off to deal with his stress, and that she would watch over the company in the meantime. She changed the locks of the company. And when Mr. Chase could not get into the company that he had transferred to Ms. Levine, he ran a truck into the building, you know, right through the front into the building.

The FBI, again, is involved in a request that the Kennedys be investigated, or Greg Kennedy for bankruptcy fraud. And they had already undertaken the investigation of Elizabeth Levine, who was at one time his attorney, eventually the person running his company, and later his perceived enemy.

If we take a look at the list again, you will [36] see Elizabeth Levine towards the middle – bottom middle of the list.

There are various other people on this list who we have reason to believe that Mr. Chase was upset with but we don't plan on pursuing the full proof in that respect.

For example, for some reason he has down the son of Ethan Merritt Weisinger, who is apparently a fairly well-known domestic relation lawyer down that way.

(Discussion off the record between Mr. Kent and Ms. Barrett.)

MR. KENT: Who eventually removed himself as counsel in a dispute with Mr. Chase's wife, Mrs. Chase, Michele Chase, formally Michele Kennedy.

Arnold Levine is Elizabeth Levine's father, and apparently part of a – as best we can determine – a respected firm in New York City.

Obviously, also on the list are the two FBI agents. So it would be our intent to – as basically as possible, without getting into the merits of the – the merits of the litigation to establish the events that would explain, you know, both why Mr. Chase was angry at the Guptas, McHann, Kennedy, Levine, and the various attorneys, and to introduce various incidents which indicate that, you know, he was in the process of [37] threatening them and intimidating them and ultimately, per the testimony of Dr. Dieter, killing them.

You know, that's it in a nutshell, Your Honor, as far as how we intend to establish why Mr. Chase intended to threaten and kill, first the Guptas, who he complained to the FBI about; then McHann, who he complained to the FBI about; then Kennedy, who he complained to the FBI about; and then Levine, who the FBI was already investigating in connection with Chase's bankruptcy. And when nothing was done, in the view of Mr. Chase, to kill the FBI agents themselves who appear on the list.

THE COURT: We're going to recess until 1 o'clock. What I will want you to be able to talk about is, given that there is a scenario you've talked about just now, then at what point, when and where was the threat to kill the FBI agents?

MR. KENT: Well –

THE COURT: I don't have that question about the alleged threat in count one, so that's what I would like to know.

MR. KENT: In count two, you mean, Your Honor?

THE COURT: Yes.

MR. KENT: Yeah. Well, we have not had a chance, as you know, to take a look at the psychiatric [38] material until now, so we're relying upon the interview with Dr. Dieter, and we'll take a look at this material in the meantime.

THE COURT: All right. Thank you.

(Recess: 10:56 until 1:29 p.m.)

THE COURT: Mr. Kent, have you finished your proffer on the other situations?

MR. KENT: Yes, I have, Your Honor, with regard to count two.

THE COURT: Okay. And I'd be happy to hear from the defendants about that.

MS. MCCREA: About the proffer, Your Honor?

THE COURT: Yes, uh-huh.

MS. MCCREA: It's sort of like –

THE COURT: In other words, the admissibility of that material.

MS. MCCREA: Well, it's a little bit like where do I start? And one of the difficulties with the proffer that was made is it didn't go witness by witness, and we've set out the concerns regarding the 404(b) aspect, and I guess – let me just get out my materials and we'll go –

THE COURT: While you are finding that, I will – I think I will just share some of my thinking at this point, and it is not – you shouldn't take this as [39] a ruling. You should take it giving you my thinking so that you can give me the help that you think is appropriate.

With regard to count two, what – assume – I'm not saying it's there – assume that the defendant said to Dr. Dieter, I'm going to kill or injure, Joe, the FBI agent. And, nevertheless, when Dr. Dieter conveyed information that there had been threats, or alleged threats, defendant has made in her presence, the threats she made to trump the psychiatrist/patient privilege were those to avoid imminent harm, on what basis could I permit evidence of those – the other alleged threats when they weren't a part of the disclosure that she made, assuming the – assume the disclosure was fine. And that's basically what I've ruled already.

Then how does the government prove the other threats? What is the threat? Is it enough to go back and reconstruct that, yes, this defendant wanted to harm FBI agents? Piece it together through circumstantial evidence? Or must there be an explicit threat?

Do you have to have that support more than just the – clearly if the incidents, Mr. Kent, that you talked about occurred, this defendant is disturbed or dangerous or confused or something, but what I'm [40] struggling with is where is the threat that's prosecutable in that?

MR. KENT: May I address that –

THE COURT: Yes.

MR. KENT: – Your Honor?

THE COURT: Uh-huh.

MR. KENT: I had a chance to really scratch the surface on the psychiatric material over the break, but I think almost all – I think all the threats are subsumed under Mr. Chase showing the doctor this list in these final sessions with him and saying, I intend, if things don't go right on Tuesday in court, to go down and start killing people. And on that list are the FBI agents.

I mean, I think – I think it's as – one way to look at it is as simple as that, because he shows her the list and says he intends to go down and kill all of them. And I – let me see here, let's see, on – actually on October 28th, 1999, in Dr. Dieter's notes, it says, what I think and why. Everybody – that this needs to be done, because they won't do anything for me, how can I be blamed?

Obviously, the reference "because they won't do anything for me" is a reference to the law enforcement officers, and the FBI in particular.

[41] It seems to me there is a passage – well, I won't waste the court's time right now, Your Honor, trying to find – there were more explicit passages that I saw, but,

you know, I think if the court sees the government's theory to a great extent in terms of the list that he was showing Dr. Dieter as the people he intended to go – I think he said something to the effect, go right down the list and kill them, as a quite explicit threat against the FBI and others, further explained by his frustration that they've done nothing for him.

THE COURT: Well, the chart notes of October 19th, two pages, may be the best evidence you've got on that.

MR. KENT: Pardon me?

THE COURT: May be the best evidence you have got on that.

MR. KENT: Where it says he has threatened people personally including the police and FBI?

THE COURT: No.

MR. KENT: There is something 10/19/99 that – well, maybe there is another 10/19/99. I have – let's see –

THE COURT: It does actually have that statement on the first two pages.

[42] MR. KENT: There is a statement that – where he tells Dr. Dieter at least on one of the 10/19/99 at 6:09 p.m., there is a call received, and it said – oh, wait, this is where she is – this is where she is telling the Corvallis Police Department what he'd said. And among the things he said to her were he has threatened people personally, including the police and the FBI. Now, there may be another October 19th entry that I'm not seeing.

THE COURT: I show that as being on page 6 and page 7, also has October 19 on it, 7:28 p.m.

MR. KENT: Let me see.

(Discussion off the record between Mr. Kent and Ms. Barrett.)

MR. KENT: Okay. Okay. Where he – it says that he does, in fact, have a book, a ledger, with the names and phone numbers and addresses primarily of individuals in the Bay area of California. I've seen the book myself.

And I know I saw something when I was looking through this over the lunch hour that he made a statement to her that he intended to – that if things didn't go right, he intended to get in his car and – on Tuesday and drive down and – and drive down and kill the people on the list.

[43] THE COURT: Off the record.

(Discussion off the record.)

MR. KENT: Your Honor, I found the page that jumped out at me. And Agent Barrett is attempting to find the exact context. These records are a little bit hard to follow because, at least our copies are not paginated, and they are not in chronological order either, but it says that – this is Dr. Dieter's notes, as best I can determine. He says that –

THE COURT: What is the date?

MR. KENT: Well, that's one of the things we're trying to figure out. It's a full length page – it seems like it's one of the later – the later days. Let's see.

MR. RICH: Can you just read the first line of the page?

MR. KENT: The top of the page is having a relationship.

MR. RICH: Page 3, Your Honor.

MR. KENT: We don't have a page 3.

THE COURT: Yeah, that's page 3.

MR. KENT: Where are you picking up the pages, may I ask?

THE COURT: In the upper right-hand corner.

MR. KENT: Those are blacked out for some [44] reason on ours.

MS. BARRETT: That's our copy.

MR. KENT: Our copy doesn't, but that one does. My copy doesn't have it. So it's page 3 of what date, Jamie?

THE COURT: November 1st.

MR. KENT: November 1st.

THE COURT: That's not based on that – the date is on page 1.

MR. RICH: The date is October 27, 1999.

MR. KENT: October 27, 1999. I would suggest to the court that, you know, if the court reads through that, rather than me reading through it, again, I submit it contains many threats against the FBI agents who have done nothing for him.

THE COURT: All right. Frankly, that wasn't my question. Assuming that that's the case, then we've still got to deal with the psychotherapist/patient privilege. And the strongest thing I could find was – this may be enough to give this count to the jury – is on the 10/19 date where the doctor says I believe you need to protect those involved or threatened and so on, and that may be enough to minimally meet the requirement of giving it the jury.

MR. KENT: But it seems to me, Your Honor, if [45] you were to read this page 3, and he's talking in terms of this list, which includes the FBI, that all of these people are in imminent danger.

THE COURT: Well, the list is referred to on the other page, too. Whether they are in imminent danger or not, you still can't prosecute it unless there was some reason to disclose it, for the psychiatrist to disclose it.

MR. KENT: I understand what the court is saying, but if a third person is in imminent danger, my understanding is that that is the basis for the psychiatrist to disclose that information.

THE COURT: All right. Well, we've interrupted your explanation, Ms. McCrea, but I wanted to dig at this a little bit.

MS. MCCREA: That's quite all right. And let me try to respond to the court's question. Our position is that the – I'm sorry, yes, October 27th report that Mr. Kent refers to is not sufficient because that happens after the disclosure has occurred by the doctor.

Secondly, it's not sufficient because at that point Dr. Dieter has conferenced with Agent McMullen. She is acting at least in concert with him, and has agreed to try

to get Mr. Chase to make statements which would be of assistance to the authorities.

[46] Going back to the statements or the reports on October 19th, and let me say our position is there has to be a specific threat, and the court has gone through Dr. Dieter's chart notes, the court knows from an examination of those that Mr. Chase expressed anger regarding a number of people throughout the time that he was being treated by both Dr. Dieter and Dr. Schiff. And yet neither one of them felt that there was a concern, a danger or any imminency throughout his treatment up until this disclosure by Dr. Dieter on October 19th.

And our position is that it is not sufficient in the 826 page where Dr. Dieter says, quote, he said he has threatened people personally, including the police and the FBI, unquote, because that is not the expression of a present intent or a threat.

And one of the difficulties with this type of a case is not only do we have, as the court knows, the psychotherapist privilege involved, but we have the fact that a threat itself is both the mens rea and the actus reus. In other words, as the court said, there has to be the intent. And so it's not a situation where you have the person making a threat and then doing something to carry it out. It is the question as to whether there was an objective threat which is the crime itself. And [47] that's the issue here.

And our position is that with what is in Dr. Dieter's chart notes, we do not have evidence of an objective threat which meets the threshold requirements of the statute.

Further, given the psychotherapist relationship, the whole point in Mr. Chase being with Dr. Dieter and Dr.

Schiff was to express himself verbally as opposed to acting out on his anger or his fantasies. And so the doctors clearly were cognizant that he had a certain amount of anger, depression, frustration. And they encouraged him to express that to them verbally as opposed to acting upon it.

And so I submit, Judge, that what we've got in these two reports is Dr. Dieter's concern, which may or may not be legitimate, and she made the disclosure, which the court has already ruled upon, but we are lacking the specific threat against federal agents that is necessary for this to be submitted to a trier of fact as alleged in count two. So there it is in a nutshell. Did I miss anything?

MR. RICH: (Shaking head.)

THE COURT: All right. I understand your position.

MS. MCCREA: Does the court want me to go [48] forward and respond on the proffer?

THE COURT: Yes, please.

MS. MCCREA: What I'd like to do, Your Honor, is make some general comments and deal with some specific witnesses, and then there are probably other objections which will be made to specific witnesses, depending on the court's ruling. And I'll just give a brief example. One would be Elizabeth Levine, because there are attorney-client secrets and confidences issues. They're also impeaching information issues, discovery issues, which would need to be dealt with concerning her.

As a general matter, the position of the defense is the grouping of these witnesses, the bankruptcy business

litigation witnesses concerning the Guptas, the wrongful termination issue concerning Rita McHann, the divorce, child custody, sexual defamation litigation witnesses, and Ms. Levine as well, all boil down to a matter of propensity. Because the people who have been listed, particularly, for example, Mr. Gupta, Greg Kennedy, who is Michele Chase's ex-husband, and those individuals, have no love lost for Mr. Chase. There are clearly issues between them in terms of the litigation that has transpired. And what they would provide in terms of effective or real information that [49] the jury needs to know, when balanced against the inflammatory nature of that information, the likelihood of jury confusion, it's outweighed, simply stated.

If the government needs to show and is entitled to show that there was a background which would relate to Mr. Chase's intent toward these two particular FBI agents, the two FBI agents Gordon McDonald and David McLean are listed as witnesses for the government, certainly they could come in and testify regarding the bankruptcy fraud investigation of Elizabeth Levine, the other bankruptcy fraud claims against the Guptas, McHann, and Kennedy initiated by Mr. Chase, and give the jury that background themselves in, arguably, a detached, neutral and professional fashion, instead of hashing up and rehashing these previous litigations.

I would indicate that if in fact we're going to get into a rehashing of these matters, then the defense is going to have to revamp its exhibit list itself, because there is going to have to be a number of exhibits to meet the exhibits that the government is providing.

So that is an overview in a nutshell.

When we get down to some of the specific matters, the matters concerning Alex Myers, for example, and the deposition with Ms. Levine, Alex Myers says in [50] the report of December 20, 1999, to Special Agent Robert Glass of the FBI that he doesn't know of any threats that Mr. Chase made to the Guptas, he didn't see Mr. Chase with a gun. He saw him playing with some shells. That has minimal, if any, relevance to the matter in the court today or before the jury.

Likewise, the issues concerning the citizen's arrest, to call the officer, Mr. Marcelino, to come testify about that, that occurred on October 16, 1994, and according to the report, present were Mr. Chase's attorney, Elizabeth Levine, Mr. Chase and another employee, Eric Fry. And a perusal of the narrative report of Officer Marcelino indicates that the officers were sent to meet Elizabeth Levine. That the attorney was the one who was instigating this. That she introduces herself as the attorney and says they want to make a citizen's arrest, that she gives the officers an overview of the case in hand, that she says she's conferred with the local district attorney and presented her case to him to seek charges against Mr. and Mrs. Gupta, and all of the contact is with Ms. Levine.

The instructions then are given to them, and so on and so on. So it has marginal relevance, but great opportunity for unfair, prejudicial effect.

Likewise, Bill Wack, the report of October 11, [51] 1995, where Mr. Chase goes forward to detail his accusations, wanting there to be prosecution of the Guptas, it simply can be dealt with in summary fashion by the FBI agents.

We have the suit by Ms. McHann, that can simply be referred to in terms of the suit happening. There being default judgment. Ms. McHann, in her statement of December 16th, 1999, to Special Agent Lamar A. Bother, indicates that she was not physically threatened or harassed by Mr. Chase, but that she heard lots of stories. There is lots of hearsay that she had heard about him. So they are not direct threats against her.

The inclusion of her attorney, Ron Palmeri, adds nothing, because he has no knowledge of Mr. Chase making any threats against anyone, but of Ms. McHann expressing some concern. He's never met Mr. Chase. He once had a letter from Mr. Chase making accusations and threatening to sue him, but has no knowledge of Mr. Chase ever possessing a weapon.

Likewise, the attorney, Don Dickman, who then represented Ms. McHann out of Corvallis, he's never met Mr. Chase. Never received any direct threats from Mr. Chase. And he didn't receive any information of threats by Mr. Chase to any other persons or officials. [52] And he made his statement to Special Agent McMullen on November 24, 1999.

There was – there is a listing of a staff person for Mr. Dickman's office, Monica Stauss, I think Mr. Kent pronounced it, concerning a telephone call allegedly from Mr. Chase to the office.

The memorandum of that is attached to the government's memorandum regarding documents submitted in camera in Exhibit B. And that memorandum indicates that when Mr. Chase found out that his bank account had been garnished, that he called and said that she was going to jail for embezzlement of business funds. Mr. Dickman

was working on a fraudulent case and better talk to Quillinan immediately. Stated he was a psychiatric patient on Social Security. It was illegal to steal from his checking account. Also stated that if the money was not returned immediately, he would be coming after us and we should watch out.

He was then contacted by Officer Rueben of the Corvallis Police Department, who was also a witness listed on the government witness list, and was specifically asked about making a threat. Mr. Chase told the officer he had not, and that he was upset about the garnishment and threatened to levy a lawsuit against the office.

[53] So that, to the extent it can even be construed as a threat, is ambiguous at best; and only serve, I submit, to unfairly prejudice the jury.

Likewise, the issue concerning Greg Kennedy, and the whole can of worms, so to speak. There is clearly no love lost between the two of them. However, in the –

THE COURT: If I could interrupt for a second. Are you saying that you would not have an objection to this background being presented by the two FBI agents?

MS. MCCREA: That's – yeah, I mean, to a certain extent. I mean, there are – Clearly they have information from doing their investigations. And that would be information that is listed on page 4 of the government's third amended witness list, which is the bankruptcy fraud, their investigation of Elizabeth Levine, and other bankruptcy fraud claims against Guptas, McHann, and Kennedy initiated by Mr. Chase. So some background would clearly be appropriate, but without going into all of

the hysterical emotional aspects. Does that answer the court's question?

THE COURT: Not really. You know, it's – frankly, your suggestion of the background coming in through the agents is tempting, but on the other hand, I can foresee all kinds of objections to people telling [54] the story, these stories, in the name of the actual participants involved, and I can't make Mr. Kent leave all those people at home if he risks having objections to testimony.

MS. MCCREA: Well, it would depend, obviously, on what the agents were saying. If the parties could agree to a stipulation concerning to what degree the background would come in, then maybe we could get that resolved in advance.

My concern, particularly regarding Greg Kennedy, is that even brining up the fact that there were molestation charges levied against Mr. Chase, which later proved to be unfounded, no charges were filed, casts a cloud over him, that is some – that is an issue that has to be met. It can't just be left hanging out there. And really the only relevance to the issue is that there is no love lost between Mr. Kennedy and Mr. Chase. That's really the issue. Not what happened or what didn't happen.

However, just bringing up the fact of an allegation of possible sexual molestation is so charged in this day and age, that the jury is not going to be satisfied with simply the – with simply glossing it over. That's my concern on Mr. Chase's behalf.

THE COURT: All right. Go ahead.

[55] MS. MCCREA: Then, in addition, Kimberly Kennedy is listed as a witness, and I submit her testimony would simply be cumulative of that of Greg Kennedy.

Then Dewey Wheeler is also listed as a witness. He was Mr. Kennedy's attorney regarding the slander suit. He's never spoken directly with Mr. Chase, although Mr. Chase represented himself in the slander action. He's never – Mr. Wheeler has never received any physical threats, and he had no knowledge of Mr. Chase owning weapons. And that was from his interview by Special Agent Gordon McDonald on December 15, 1999.

Michael Walton was the attorney for Greg Kennedy who conducted the deposition of Mr. Chase in conjunction with the representation of Dewey Wheeler regarding the slander suit, and the information – this is the information about supposedly smearing blood on the wall.

First, it's totally collateral. Secondly, it relies on triple hearsay. And the report of Agent Barrett from January 5, 2000, is also attached to the government's memorandum regarding documents submitted in camera as Exhibit D. And what it specifically indicates is that the deposition went on until about 7 o'clock. [56] that night; that Walton was the last person in his law office; and that Mr. Chase left prior to Mr. Walton; and he thought he was the last individual to use the firm's bathroom. The next day the office manager told Mr. Walton that the office manager had been told by the janitorial service that blood had been smeared all over the bathroom walls, which, as I say, is entirely collateral to anything in this matter, but it relies on triple hearsay. It's opinion. And it denies Mr. Chase's right to confrontation under Davis versus Alaska.

We get to Rand Stephens, who was Mr. Chase's attorney concerning the lawsuit against Mr. Kennedy for slander and defamation, again, we get into potential attorney-client issues. And we have no threats made against Rand Stephens, according to his report – I'm sorry – his statements both of May 21st, 2000, to Agent Barrett and January 4, 2000, to Gordon McDonald. But he had concerns because he believed that Mr. Chase had threatened him indirectly through his staff.

Then we have Sarria Hodge, who was the employee of Mr. Stephens, and we have the call from Mr. Chase to the effect, according to her, in her conversation with Agent Barrett on May 31st, do your resume because you're going to have to find a new [57] employer, you won't have one when I get done, which arguably means he's going to report Mr. Stephens to the bar, he's going to fire him, he's going to make his life miserable, it could be a number of things.

Finally, concerning Elizabeth Levine, she was Mr. Chase's attorney. There is an attorney-client privilege relationship involved here.

In addition, according to the discovery received from the government, there were a number of matters which were submitted to U.S. Attorney John Kennedy in Oakland, California, on November 17, 1998, which included a March 16, 1995, transcript of the bankruptcy hearing where Elizabeth Levine advises the court she's not being paid, a tape recording of that hearing, copies of the State Bar of California file relative to Ms. Levine, grand jury documents from American Express relative to accounts held by Ms. Levine in 1995, grand jury bank accounts from

Wells Fargo, the Chase Pacific and Bank of the West, which is Data Envelope.

And I wrote a letter on May 22, which was sent by facsimile, asking for this information, since it appeared to be significant impeaching information concerning Ms. Levine, I was advised on Friday by Agent Barrett that she did not believe that the information [58] was accessible.

So while there apparently is a lot of impeaching information concerning Ms. Levine, that has not been and will likely not be provided to the defense.

So in addition to the objections that were made in the motion in limine and objections to the government's evidence, we're asking the court to either exclude this evidence or to pair it down so that it is not – so we're not retrying every civil litigation that's occurred in Mr. Chase's life over the past seven years or so. And at the expense of the jury being overwhelmed by the number of people involved, the names of all the players, and the flat propensity evidence that the government is going to be allowed to put in, which is really, I submit, collateral overall to the question of the intent as to count two.

THE COURT: All right. Mr. Kent.

MR. KENT: Your Honor, just a couple of observations. I believe the proffer that I made was an effort not to pass judgment on the – who's right and who is wrong as part of the litigation, but merely to explain the motivation and the intensity with which Mr. Chase held these various parties, and the ensuing anger that was manifested towards the FBI when, in his words, nothing happened.

[59] I notice that Ms. McCrea goes through witness after witness saying there weren't any threats or minimizing

threats. As observed by the court earlier, a threat does not have to be communicated directly to the object of a threat.

In this case many of the threats were being communicated to Dr. Dieter. And as we observed in our memorandum, those threats pose even greater difficulties for people who don't even know that they have to protect themselves.

But, also, I notice in reading from Sarria Hodge's 302, she mentioned the one about getting a resume out, but in that same – in that same 302, it said Hodge advised that after Stephens filed a substitution order to remove himself as Chase's attorney, she received a telephone call from Chase at Stephens' law office where he threatened to blow them away.

So there were serious threats that were directly communicated. There were serious threats that were indirectly communicated to Dr. Dieter. And unless the government can establish just how intensely Mr. Chase was upset with the Guptas, was upset with Rita McHann, was upset with Elizabeth Levine, was upset with the bankruptcy trustee, and with the Kennedys, all of [60] whom appear on the same list with the FBI agents where he's telling Dr. Dieter that he intends to take off and kill these people, the threats don't make sense.

And in taking a further look, Your Honor, at the page 3 that I was referring to before of – I think it was the October 27 contact, it says – further down it says that he was not imminently going to harm anybody, at least not until he met with his lawyer Tuesday, and that he would call me or his therapist right away after that meeting to discuss how it went, that he could guarantee he would not act on his impulses before that time, but he really was very angry about the legal issues, and was angry that I

would even consider warning his potential victims. But his status was so unstable at that particular point in time, he also added – I told him that he cannot kill anybody, no matter how angry or hateful, that is against the law. He stated that he didn't give a flying F about the law, that he was going to do whatever he felt like doing, and that nobody could stop him. Not the MHC, or the police, or the FBI.

And earlier he said – he goes on again about the FBI not protecting him. It states, they will get theirs, too, as well as all the judges and lawyers.

So, you know, as I have said earlier, Your [61] Honor, it's impossible to understand those threats without getting into – without getting into some of the related litigation and the intensity of Mr. Chase's conduct in the course of that litigation, and why that anger was transferred to the FBI when they didn't do anything about his allegations against these people, so –

THE COURT: All right. Go ahead.

MS. MCCREA: I submit that it is possible for the situation to be set out so the jury could understand it without getting into all of this prior background.

And the problem with bringing all these witnesses in to testify is that really what the government is doing is saying, jury, you should convict Mr. Chase because he's made threats against a whole bunch of people, and you need to keep him off the streets. And anything that he said to Dr. Dieter during the course of his treatment about anyone other than a federal agent is really – is not relevant in the sense that that's not what he's charged with, and that's not what he's on trial for.

And it is very, very dangerous to bring all of this in, and to expect the jury to be able to separate all that out.

When we get to the report of the statements of [62] October 27, I submit we can't look at it in a vacuum. We have to realize it was written on November 1, 1999. This is after Mr. Chase has been arrested. This is after the fact of Dr. Dieter's disclosure being generally known. And she has to be concerned, because she's made a disclosure, which is a big exception to her responsibility as a treating psychiatrist, and she's got to be concerned about being right and not being exposed to civil liability, and so that – her bias at how the report was written, since we don't have any transcript or tape recording of that conversation between the two of them, has to be an issue as well.

MR. KENT: Your Honor, I just want to also point out that the continuation of page 3 on page 4 as far as a specific reference to the list as the people he intended to kill, Dr. Dieter notes that – it says – has many names that he refers to in the ledger by pointing to them, it appears that he has a list made up that includes several people. I was not able to see the names directly.

He was detached in affect, discussing how everybody had wronged him, a general disregard for the law and anybody in authority. He refuses to look at the consequences his actions may have on self or others.

And, you know, it's only a quirk that we're in [63] federal court prosecuting a federal – threats against federal agents that all of these threats aren't charged. I mean, logically – logically the entire list of threats should be charged in a consolidated criminal threat proceeding, but since our jurisdiction is restricted to the federal law enforcement threats, we need to bring in the rest to make

sense of the threats against the agents. And – but I – I just observe that it's a quirk of jurisdiction that all of these threats are not consolidated into a single criminal action, and, thus, in the words of the case law, inextricably intertwined.

THE COURT: Do I have your exhibits?

MR. KENT: Yes, you do, or you should, Your Honor.

THE CLERK: I haven't been given any exhibits.

MR. KENT: Do you have those?

THE CLERK: No.

MR. KENT: No?

(Discussion off the record between Mr. Kent and Ms. Barrett.)

MR. KENT: My understanding – I was out of the office on Friday – was the defense was provided with copies of exhibits, and I thought the court was, too, but – so we're checking on that.

[64] THE COURT: And defense exhibits?

MS. MCCREA: We submitted the transcripts in camera, and I believe copies of the other two telephone calls. And we've not provided the photographs, although they were put on the Internet. We can provide those to the court now, but they are the same that were in the motion to suppress.

MR. KENT: Your Honor, in the meantime we can provide you with our copy, if you'd care to look at it.

THE COURT: No, I – it wouldn't be helpful unless we all have one.

MR. KENT: Okay.

THE COURT: Pat.

(Discussion held off the record.)

THE COURT: Ms. McCrea, some of this – I'm going to allow at least some of this evidence as intent evidence or having to do with the issue of intent. And what I do invite you to do is to draft a form of jury instruction to caution the jury against its misuse. And I can go ahead and do that myself by writing something extraneously, but I invite you to do so if you want to, because it is material that could be misused, and I think the warning ought to be rather strong.

MR. KENT: Do they have them?

THE CLERK: No.

[65] MR. KENT: Your Honor, if you could give us 10 minutes, we'll try to track them down. I had Ms. Yothers over here this morning for the purpose of exhibit issues, so.

MS. BARRETT: Is this it?

MR. KENT: It is, but we all need copies. So if we could have 10 minutes to track it down.

THE COURT: Yes, just a moment, please.

(Discussion held off the record.)

THE COURT: Ms. McCrea, before we take a break, and we can take a little break, I don't have anything

else until 3:30, so we have a little more time, but you said you had some additional argument on your motion to dismiss count two. Have I heard that now or do – just trying to make sure you've had a chance to talk about everything that you need?

MS. MCCREA: I've pretty much indicated that to the court, that Mr. Chase was speaking his mind with his doctors, but not speaking his intent, and that there was – that there were no specific threats. If you look into the doctor's chart notes, we don't have anything in quotation marks regarding threats that Mr. Chase allegedly made concerning government agents.

And other than that, Your Honor, I believe I've covered our position regarding count two.

[66] THE COURT: All right. We'll take a 10-minute break.

(Recess: 2:24 until 2:46 p.m.)

THE COURT: We're going to handle the 404(b) evidence as follows: I prefer to be able to give you rulings on each item of evidence before we actually start the trial. I'm not able to do that here, but I am going to order much of what was summarized in the proffer is relevant on the issue of intent. Some of it is not. What I am going to do is require the government to put on the FBI agents who were working these issues before the other witnesses. And I will limit the other witnesses if they begin to get cumulative of the FBI material. If there is information that the agents cannot testify to, then I may allow some evidence from other witnesses. And so I would expect much of this material to come in in summary fashion, and from those named FBI agents.

MR. KENT: Gordon McDonald and Agent McLean?

THE COURT: Uh-huh.

MR. KENT: Okay.

THE COURT: Yes.

MR. KENT: That may be overly optimistic, Your Honor, just so the court is aware of that. I mean, there is an awful lot that these agents were not aware [67] of. What they were receiving were Chase's specific complaints about supposed federal crimes that these other folks had committed: Greg Kennedy, bankruptcy fraud; Rita McHann, credit card fraud.

THE COURT: Well, if the threats were as you've described them, that is basically retaliatory threats, then they are retaliating for something –

MR. KENT: For them not doing –

THE COURT: – or for not doing something.

MR. KENT: Right.

THE COURT: So the communications with the defendant should reveal some illumination on the subject matter.

MR. KENT: Okay.

THE COURT: But all of the history of the – between all of these individuals, it doesn't seem to me, would be as directly related to them.

MR. KENT: Your Honor, I had Courtney Olive, one of our law students for the summer here in the courtroom, did the 404(b) survey, and as he listened here in court, he suggested, and I asked him to get copies of those portions of the cases, United States versus Gilbert, which is the 181 F.3d 152 First Circuit 1999 case, and Hopkinson versus Shillinger 866 F.2d 1185, Tenth Circuit 1989, which appear in his summary as [68] having facts quite analogous, you know, for purposes of scope of 404(b) proof, so the Gilbert case and the Hopkinson case.

THE COURT: I'd like to go on to the government's exhibits. Government Exhibit Number 1, I take it you haven't decided what you want to offer?

MR. KENT: Correct, Your Honor. And I'm not sure if we will be. They are essentially the notes from Dr. Dieter's records. And more than likely we would be relying upon her testimony, but I left that open until we had an opportunity to examine the – examine her records. Does the court follow me on that?

THE COURT: Yes.

MR. KENT: How does the court wish to –

THE COURT: Just a minute, please.

MR. KENT: Okay.

THE COURT: Is there any further objection to Exhibit 11, Group Exhibit 11?

MS. MCCREA: One of the further objections I have, Your Honor, is specifically to documents 11-E and F, which are the judgment for $170,000 plus attorney's fees against Chase, et cetera, an abstract of judgment or decree

filed in Contra Costa County against Chase's properties. There are a number of documents in addition to 11-E and F which demonstrate dismissals or judgments, [69] and our position is, this gets into precisely the determination of the correctness or incorrectness of Mr. Chase's lawsuits or defense of lawsuits other than what the government was indicating concerning its attempt in its proffer to be sort of evenhanded and not get into that aspect, but these documents clearly do that.

In addition, Group 11 as a whole – I may have already made this objection or maybe Mr. Rich did in his filing on May 11th – seem to be confusing, cumulative and irrelevant.

THE COURT: Is 11-G an acknowledgement of the compromise of the 10/4/95 judgment in 11-E?

MR. KENT: No, Your Honor. I believe that that – 11-G pertains to the Gupta litigation that was – where a compromise was reached during the bankruptcy proceedings.

11-E relates to the judgment against Mr. Chase personally and his various companies because of money that no longer – was no longer present in the bankrupt estate. And, obviously, our position is that this judgment initiated by the bankruptcy attorney and the bankruptcy trustee explains why they are on the list, and why he's upset with them.

MS. MCCREA: Well, I guess the thing is, they [70] were taken off the government's witness list, so I'm not sure how this information is coming in.

MR. KENT: It's coming in by certification. We went down and we acquired certified copies of these records.

MS. MCCREA: No, I'm sorry, Mr. Kent, I'm not talking about the records. I'm talking about – it appears now you are expanding the government's proof to include threats against the bankruptcy trustee and the attorney.

MR. KENT: Well, it explains why they are on the list, yes. In other words, we went through, this morning in my proffer, and Meador and Oliner are on the list, and these documents explain why he was upset with these people, which appear on the same list as the FBI agents. And, of course, these people also, I should indicate, Oliner and Meador, referred a matter to the FBI for criminal investigation regarding some of the money that went out the – appeared to be improperly diverted from the bankrupt estate.

MS. MCCREA: And where I'm getting confused, Your Honor, is the government's third amended witness list doesn't include any reference to Oliner and Meador, and I'm just trying to make sure I'm going to prepare to meet the witnesses on Monday.

[71] MR. KENT: We don't intend to call them, Your Honor. We merely intend to introduce the – these documents that show the conduct of Oliner and Meador that was adverse to Mr. Chase's interest, which would provide the reason he was upset with them and they head the list.

THE COURT: Tell me how Exhibit 13 – 12 is admissible.

MR. KENT: 12 would come in through Alex Myers. And would explain essentially the threats that were being communicated in the course of the litigation with the Guptas, in this instance a – the holding of this firearm magazine during the course of the deposition in a manner that – as bullets were being clicked in and out – in a manner that understandably upset Alex Myers. And then Myers ends up on the witness list – or ends up on the threat list. And it exhibits, again, you know, the intensity with which Mr. Chase – Mr. Chase's dislike for the Guptas and indirectly Mr. Myers.

THE COURT: Do you have an objection to this?

MS. MCCREA: Yes. And it's certainly cumulative. I mean, it's entertaining from an attorney's standpoint, the arguments between Ms. Levine and Mr. Myers, but it's certainly cumulative of anything [72] that Mr. Myers can say. And we have our unconditional previous objections concerning relevancy and prejudice and collateral issues.

THE COURT: 13.

MR. KENT: 13 is a letter from Mr. Gupta to Mr. Chase in which he indicates that if they don't get payment for some items that were taken out of the warehouse, he would be – he would have to file a theft report with the police, and he did so.

THE COURT: Do you have further objection to 13?

MS. MCCREA: We have stated our objections regarding that, Your Honor.

THE COURT: Thank you. How about 14?

MR. KENT: Your Honor, I should indicate, you know, I thought you were just referring to 13-A originally, but obviously 13 is a more comprehensive group exhibit.

THE COURT: I see that.

MR. KENT: Okay. 14 is – these are the – this is the citizen's arrest form, little note signed by Steven Chase leading to the arrest of Mr. and Mrs. Gupta the Sunday evening that I mentioned on the $2500 stop payment check.

THE COURT: Further objection Counsel?

[73] MS. MCCREA: No, Your Honor.

THE COURT: And is that true for 21 also?

MS. MCCREA: The court is asking if there is further objection?

THE COURT: Yes.

MS. MCCREA: As to 21-E, 21-F, and 21-G, we have the same circumstances I mention in reference to Group 11, and that is we get into the default judgment, we get into the recording of the judgment, execution of the judgment, which tends to lend legitimacy to Ms. McHann's situation as opposed to Mr. Chase, and that, as I stated before, is a concern.

THE COURT: All right. And 22?

MS. MCCREA: 22-A, we have the analogous situation concerning the 22-A, the plaintiff's notice of filing of foreign judgment, 22-B, the certificate of lien, and then as to 22-B-1, the memo, since Monica Stauss was listed as

a witness, her memorandum would be cumulative of her testimony.

22-D, the closing argument in McHann versus Chase, simply appears to be extraneous hearsay.

And as to – well, I guess that's it as to 22-F – I mean, Group 22, there are no further objections other than those and the objections previously stated in writing.

[74] MR. KENT: Your Honor, we would withdraw 22-B-1 and expect Ms. Stauss to testify.

And as far as the closing argument is concerned, you know, we're okay with removing that, 22-D. I think the judge's letter at the end indicates what the order is.

THE COURT: And what do you wish to offer 23 for?

MR. KENT: Your Honor, Dr. Dieter indicated that among the personal information that was collected in materials by Mr. Chase were what appeared to be Yellow Page photos of attorneys. And when the search warrant was executed, there was no – there was no such item found, but we will be asking her whether or not she recognizes this Yellow Page as a photo that she saw in Mr. Chase's materials.

THE COURT: The defendant's position on 31?

MS. MCCREA: Well, going back to Exhibit 23, we would also object that there is a lack of foundation and that –

THE COURT: It's not admissible. You can save your words on that. It may come up again during Dr. Dieter's testimony, but it's not – this is not admissible.

[75] MS. MCCREA: We don't have any additional objections.

THE COURT: All right. Then 33?

MS. MCCREA: We made the objections, Your Honor.

THE COURT: Thank you. 34?

MS. MCCREA: In addition to the objections previously made, Exhibit 34-B, the July 29, '98, letter from Mr. Stephens to Michele Jewell disputing Jewell's claims on behalf of Chase, it's hearsay, and it's not relevant. And the other objections we've already made.

THE COURT: 34-B?

MS. MCCREA: Yes.

THE COURT: And why is 34-B admissible?

MR. KENT: It explains, Your Honor, why Mr. Chase was angry at Rand Stephens, and had a motive to – had a motive to threaten him.

The – What was happening during this period of time was – it appears also on some of the Social Security documents – Michele Jewell, also known as Michele Chase, was filing papers on behalf of Mr. Chase. In other words, she was passing on – was passing on his information to various authorities including the attorney in this case. And so she seems to be acting on behalf of Mr. Chase in this – in the letter that was [76] sent to Mr. Stephens, that Mr. Stephens responds accordingly. And it's offered to establish its impact on the state of mind of Mr. Chase.

THE COURT: Now, Exhibit 41, now that count three has been dismissed, is that of any relevance?

MR. KENT: It would not be, your Honor.

THE COURT: All right. And –

MR. KENT: Now – right, yeah, I mean, I – it would – it would not be.

THE COURT: And 51?

MR. KENT: That establishes that a few hours before -- a few hours before the federal law enforcement people went to Mr. Chase's home, Sheri Teixeira, who is a neighbor of his down in California where he also has a home, called and told him that the marshals had come around and that they were getting set to arrest him.

THE COURT: Any objection to this exhibit?

MS. MCCREA: To 51?

THE COURT: Yes.

MS. MCCREA: No.

THE COURT: Thank you. 61, pictures.

MR. KENT: Yes. 61 are miscellaneous photos of the execution of the search warrant.

THE COURT: Any objection to 61?

MS. MCCREA: Not any additional objections.

[77] THE COURT: Thank you. And 62.

MR. KENT: 62, Your Honor, is – are these books and – If I could just check on this.

THE COURT: All right.

(Discussion off the record between Mr. Kent and Ms. Barrett.)

MR. KENT: 62, Your Honor, is the 1999 appointment book. And there are certain passages in there that are relevant, such as – right at the end is this list of, under our theory of the case, targets, followed by a poem.

I mean, I don't have any problem with the whole – the whole thing coming in if the defense has no objection. And we intend to excerpt some of these for the jury in their jury book rather than an entire copy of it. See, there is three different books. And instead of making entire copies, we are going to make copies of excerpts of relevant passages for the benefit of the jury.

THE COURT: But this is only one book marked 62.

MR. KENT: Right. 62, and then the other two are 73 –

THE COURT: Okay. Defendant's position?

MS. MCCREA: The defendant's position is we [78] object to 73 because they are from '97 and '98, and they have no relevance to the charges herein.

As far as Exhibit 62, we have no additional objections to the address organizer book for 1999 itself. We do object to the government making, as it terms it, relevant excerpts available for the jury because it takes those pages out of context and emphasizes them for the jury. And the entire document should be admitted, if at all, and then they can look through it. But to have particular excerpts is

going to draw their attention to what the government thinks is the most damning and leave out the innocuous, everyday things, because it was a year-long book.

THE COURT: What you could do is prepare an illustrative exhibit for part of it if you wish.

Any objection to 63?

MR. KENT: I might indicate, as far as 1998 is concerned, Your Honor, there are references in there to Mr. Chase's contact with Dave McLean of the FBI.

THE COURT: 63 through 71 are – and also 72 are physical exhibits. Any objection to those?

MS. MCCREA: No additional objections.

THE COURT: Thank you. And 77 through 83?

MS. MCCREA: There is – as far as 77 goes, we had offered to stipulate that Mr. Chase had traveled to [79] California. It's up to the government if they want to introduce all the papers and receipts.

Exhibit 79 through 83 had to do with Mr. Chase's computer. The computer has been returned. I'm not sure what exactly the exhibits are that the government is intending to introduce, since apparently all of – 79 through 83 have all been returned to the defense.

MR. KENT: At the defense's request, we returned these exhibits, Your Honor. We merely note that they – we had a stipulation from the defense that they would – they would not object to any foundation necessary to establish that these items were seized.

There is something called Exhibit 78 which is a projects list, which includes entries that were created from off of a computer.

THE COURT: So you are not really going to offer 79 through 83?

MR. KENT: No, other than to establish – you'll note in there, it says return to defense after analysis, we might merely want to indicate that they were seized, but not – we're not going to introduce them.

THE COURT: Okay. The ruling on the government's exhibits is as follows: Group 11 is [80] received as 404(b) evidence, subject to a limiting instruction.

Group 12 is not received.

Group 13, Exhibit 14, Group 21 are received as 404(b) evidence, subject to a limiting instruction on the issue of intent. All of these 404(b) rulings are on the issue of intent.

22, 22-A, 22-B, 22-C, 22-E and 22-F are received as 404(b) evidence.

22-B-1 is withdrawn.

And 22-D is not received.

Exhibit 23 is taken under advisement at this time. There is not sufficient foundation for this at this point.

Exhibit – Group Exhibit 31, 33 are received as 404(b) evidence.

Exhibit 34-A and 34-C are received as 404(b) evidence.

34-B is not received.

Group Exhibit 41 is not received.

Exhibits 51, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71 and Group 72 are received.

Group Exhibit 73 is not received.

77 and 78 are received.

And 79, 80, 81, 82 and 83 are not offered.

[81] Now, do I have a similar list of defendant's exhibits?

MR. KENT: Your Honor, if I could just inquire with regard to the 1998 black address organizer book, there is entries, as I say, of contacts between Mr. Chase and Agent McLean in there.

THE COURT: Show me.

MR. KENT: Okay. This is –

THE COURT: This is after the –

MR. KENT: No. This would be when the matter was being investigated.

THE COURT: Show me what you've got.

(Discussion off the record between Mr. Kent and Ms. Barrett.)

MR. KENT: Okay. (Document tendered.)

MS. MCCREA: Your Honor, the defense would withdraw its objections to the 1998 book.

THE COURT: All right. Then '98 will be marked exhibit – I don't want the two books to have one exhibit number. It will be marked Exhibit 73-A, and it is received.

MR. KENT: And 1997 falls into some of the same category, Your Honor, in that it references a lot of the litigation that was going on that's the subject matter of the other exhibits, you know, such as the [82] contact with Rand Stephens' firm, reference to McHann, Levine.

(Discussion off the record between Mr. Kent and Ms. Barrett.)

THE CLERK: Judge, he has the other book already marked A. The one you said to be A is actually 73-B. Could we use 74 for this one?

THE COURT: No. Just use 73-B, that's fine. It can come in as 73-B, the '98 book. Strike what I said about 73-A.

MR. KENT: And may the 1997 book – I don't know if the defense has any objection to that. It would seem to fall into the same category with references to the pertinent litigation.

THE COURT: Point out some references to me and I'll consider it.

MR. KENT: This is just an example, but they are highlighted. Well, actually there is more here, Your Honor, I just – I pulled those out just as illustrative, but there is other –

THE COURT: What is the defense position on that?

MS. MCCREA: We object to 1997.

THE COURT: That is not enough to let it in, but if there is some others you can show me –

[83] MR. KENT: If we can do this, regarding that, Your Honor, we'll take a closer look at it, if we feel there is some compelling entries, we'll revisit it with the court.

THE COURT: All right.

MR. KENT: And that is with reference to 73-A.

THE COURT: Yes.

Defense exhibits are transcripts – or the messages, actually – Are 105 through 112 all tape recordings or are some of them transcripts?

MS. MCCREA: I believe that we listed them as tape recordings. What I'll need to do, Your Honor, is to amend our exhibit list so that we have the recording and then the transcript, the recording and then the transcript, but the court has the transcripts of the recordings.

THE COURT: Then I won't rule on these numbers. You can expect me to receive the recordings but not the transcripts, although they can be made available for the jury as illustrative exhibits. And I will tell the jury the recording is the exhibit. The others may be, however, of some assistance to them.

MR. KENT: Your Honor, do we have access to – at this stage we haven't had access to these, I don't believe.

[84] THE COURT: Wasn't a copy of those given to you this morning?

MS. MCCREA: Yeah, we provided them the transcripts.

MR. KENT: These are the transcripts for which exhibits?

MS. MCCREA: Well, it's exhibits –

THE COURT: 105 through 112.

MS. MCCREA: Yes.

THE COURT: Right?

MS. MCCREA: Thank you, Your Honor. Yes.

THE COURT: And you should provide copies of the cassettes also. These are the small size cassettes, on these two cassettes; is that correct?

MR. RICH: I don't know what you have there, Your Honor. I'm assuming that that's correct.

THE COURT: I've got what you sent me. Actually, there is a note, yes, that's – that was confirmed.

You also have Exhibits 101 through 104, and you said you didn't have those photographs yet?

MS. MCCREA: We have them here. We showed them to Ms. Barrett this morning. We can show them to the court. There is no 104.

THE COURT: 101 to 103?

[85] MS. MCCREA: Yes.

THE COURT: Is there any objection to those?

MR. KENT: The – as I understand those photos, Your Honor, they are photos of various police vehicles that were there after the incident between Agent –

THE COURT: Show them to Mr. Kent.

MR. KENT: Between Agent McMullen and Mr. Chase took place. In other words, after the standoff and the surrender, these vehicles showed up, you know, so if you recall the testimony of Agent McMullen, he was basically going it alone with regard to the surrender. So I mean it has the potential to arguably confuse the jury that the house was surrounded by all these law enforcement people at the time Mr. Chase surrendered.

THE COURT: 101 through 103 are received.

104 was not offered.

The defendant has field a motion in limine to limit the government from stating in the trial that the ammunition seized was armor-piercing ammunition. As I recall, it was hollow point ammunition. And the motion is granted. You may not refer to it as armor-piercing ammunition. More or less –

MR. KENT: We can explain what hollow point – [86] we can ask one of the agents to explain what hollow point is.

THE COURT: Sure. And if you want to make a record, before we do that, Agent Barrett knows why I do this, and Ms. McCrea's father does, I know.

MR. KENT: I'm sure I'm wrong that it does not pierce armor.

THE COURT: It does the opposite. It's supposed to open up and create a big wound. That's the whole idea.

MR. KENT: So I will not refer to it as armor piercing.

THE COURT: Entirely different creation.

Okay. The motion to dismiss count two is denied on the record before the court without prejudice to the defense making a motion concerning count two at the end of the government's evidence.

The only other matter I think that I have here – help me, because I've lost the paper – is the insurance file, but I take it that really has to do with count three, Mr. Kent?

MR. KENT: Well, it doesn't exactly, Your Honor. The insurance file contained certain documents that indicated that Mr. Chase was receiving disability. I guess it would more pertain to count three. Let me [87] check.

(Discussion off the record between Mr. Kent and Ms. Barrett.)

MR. KENT: Your Honor, we'll withdraw our request that the insurance documents be admitted in part.

THE COURT: Thank you.

MS. MCCREA: Could we request –

THE COURT: Yes?

MS. MCCREA: Could we request a deadline for the government to determine whether it intends to introduce any documents in Group 1 or not?

THE COURT: Yes. One of the troubling things about the last – the preparation for this trial, Mr. Kent, has been your tardy nature of your delivery of materials to the defense counsel, and I just won't tolerate that in the future when we're right next to trial.

When can you have the documents – when by tomorrow can you have those documents identified?

MR. KENT: Yes, Your Honor.

THE COURT: All right. Then tomorrow at 5 o'clock.

MR. KENT: Very well.

THE COURT: All right. Do we have all of the [88] other documents?

(Discussion off the record between Mr. Kent and Ms. Barrett.)

THE COURT: And for both counsel, I also will require any amended exhibit lists by tomorrow at 5 o'clock.

MR. KENT: Your Honor, when you ask if there is any other documents, you mean additional exhibits that are still coming in?

THE COURT: Yes.

(Discussion off the record between Mr. Kent and Ms. Barrett.)

MR. KENT: Not that we know of, your Honor.

THE COURT: All right.

MS. MCCREA: Your Honor, Mr. Rich advises me that he's in trial all day tomorrow. And based on the discovery that was provided to us on Friday, we attempted to be able to deal with the third amended exhibit list as well as we could to be ready. Based on the information that was provided and the court's rulings, it is very likely that we're going to have an amended witness and an amended exhibit list. And I'm just indicating we will do our best to have it to the court by 5:00 tomorrow, but in trying to gather together the appropriate documents, with

Mr. Chase being in [89] custody, we may need a little more time.

THE COURT: I think that we ought to also get together at 8 o'clock Monday morning.

Is there anything further?

MR. KENT: No, Your Honor.

MS. MCCREA: Not at this time, Your Honor.

THE COURT: Thank you very much.

THE CLERK: Court is in recess.

(The proceedings were concluded at 3:37 p.m.)

CERTIFICATE

I, Deborah Wilhelm, Certified Shorthand Reporter for the State of Oregon, do hereby certify that I was present at and reported in machine shorthand the oral proceedings had in the above-entitled matter. I hereby certify that the foregoing is a true and correct transcript, to the best of my skill and ability, dated this 18th day of July, 2001.

/s/ Deborah Wilhelm
Deborah Wilhelm, RPR
Certified Shorthand Reporter
Certificate No. 00-0363

[NOTARY STAMP]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. STEVEN GENE CHASE, Defendant-Appellant.	NO. 01-30200 TRANSCRIPT OF PROCEEDINGS

EXCERPTS FROM ORAL ARGUMENT HEARING HELD 3/25/03 BEFORE EN BANC PANEL

Judge:	Various Judges
Government's Attorney:	Jeffrey Kent
Defense Attorney:	Brett A. Purtzer

[2] J: Various Judges
JK: Jeffrey Kent, Government's Attorney
BAP: Brett A. Purtzer, Defense Attorney

JK: . . . And this court, a few months before the *Chase* opinion was issued, rendered the *Alexander* opinion in the attorney-client realm, which essentially held that when an attorney is a percipient witness to threats made by his client, there is no privilege. Now why wouldn't that be true in other realms of privilege?

J: So you're drawing an analogy between the attorney-client privilege and this one?

JK: Well, there is, I know the analogy is not perfect, your Honor, that

J: But they're both privileges

JK: They're both privileges

J: And they're both very strongly founded in the law. In fact the attorney-client privilege is quite a bit older than this one, if I remember right.

JK: Well, it wasn't fully established in the federal common law until Jaffee ruled that there was such a privilege in 1995.

[3] J: In the attorney-client realm, the lawyer's duty to disclose is not fulfilled by warning of the incipient crime. In other words, he still has to then testify. Is that correct?

JK: That is correct. He becomes, in the words of the *Alexander* opinion dealing with threats, a percipient witness to a crime and in this instance, there were indeed serious, objectively verifiable threats against a number of people, very serious threats including FBI agents.

J: Were those, was that enough evidence to convict him without the testimony of the therapist?

JK: I, I would say, no. Essentially it is my evaluation of this case, that the case is non-prosecutable without the testimony of the psychiatrist.

J: Why is that? Why is that, it seems to me

JK: She was the percipient witness to the threats, your Honor. She was really, I know that Judge Fletcher mentioned a potential hearsay use through the FBI agents, but they, of course, only became aware of it after she concluded this disclosure was appropriate.

[4] J2: The central, I'm a little mixed up about the procedure here. To the count of conviction.

JK: Pardon me.

J2: Only, there was only one count of conviction, is that correct?

JK: That's correct. The count of conviction involved threats against those coming to serve a search warrant at the home. The defendant was not convicted of his threats against the FBI agents.

J2: Right, and wasn't that heard, that statement, that threat in Count 1, was that heard by the operator in the clinic?

JK: Two of the operators.

J2: Two of the operators.

JK: Yes, yes. Those were, but that was a distinct threat.

J2: But that wasn't privileged.

JK: That did not, that did not invoke privilege issues. There, Mr. Chase called into the Kaiser Permanente offices trying to reach Dr. Dieter and in the process said people are going to die if law enforcement shows up at my house. Dr. Dieter, who realized by then the matter had become a full [5] fledged criminal matter, fortunately put Agent McMullen on notice just a couple of minutes before he got to the house that Chase was aware of the imminent execution of the search warrant.

* * *

STATE OF WASHINGTON)
: ss.
County of Pierce)

Kathy Herbstler, being first duly sworn, on oath, deposes and says:

That the foregoing transcript of proceedings was transcribed by me; that the transcript is a true, and complete record of the testimony of the participants at said hearing with the exceptions noted in the transcript.

FURTHER YOUR AFFIANT SAYETH NAUGHT.

_____
Kathy Herbstler

SUBSCRIBED AND SWORN to before me this ____ day of January, 2004.

/s/ Susan C. Harsh
NOTARY PUBLIC in and for
the State of Washington,
residing at Tacoma.
My commission expires: 7/14/06.